

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



Original  
**74-2694**

B

## United States Court of Appeals

For the Second Circuit.

FRANCIS X. DONOVAN,

P/S

Plaintiff-Appellant,

vs.

PENN SHIPPING CO., INC., and  
PENN TRANS CO., INC.,

Defendants-Appellees.

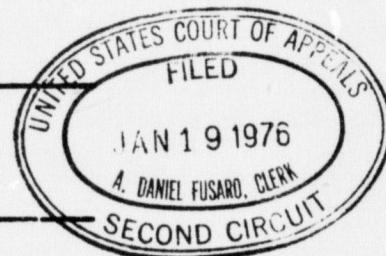
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*On Appeal From The United States District Court  
For The Southern District of New York*

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## Appellant's Appendix

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## DOCKET ENTRIES

FRANCIS X. DONOVAN v. PENN SHIPPING CO. INC. et al.

\$1

- Aug 13,70 Filed complaint and issued summons.  
 Sept.17,70 Filed summons with marshal's ret. Served Penn Shipping Co. Inc. and Penn Trans Inc., by Miss Mary Hassett on 8-19-70
- Oct.20-70 Filed Notice of Appearance for defendants.  
 Oct.3,70 Filed ANSWER of defts to complaint.  
 Oct.3,70 Filed defts notice to take deposition of pltff.  
 Dec.14-70 Filed Plaintiff's Note of Issue and Statement of Readiness.  
 Jan.13-71 Filed Notice of Pre-Trial Conference. Sugarman, Ch.J.  
 Apr.12-71 Filed Plaintiff's Pre-Trial Memorandum.  
 Apr.12-71 Filed Defendant's Pre-Trial Memorandum.  
 Apr.12-71 Filed Pretrial Order. So ordered. McJohey, J.  
 OCT 18 71 Filed Pltff's notice of taking the deposition of Willis Thompson.  
 OCT 19 71 Filed Deft Penn Shipping Co Inc. answers to Interrogs.  
 FEB 22 72 Filed Deft's notice of motion for an order adjourning the trial in this matter until no earlier than Mar. 1<sup>st</sup> 1972. Ret. 2-22-72.  
 FEB 22 72 Filed Memo endorsed on motion filed 2/22/72, "Denied without prejudice to renewal before trial judge on ground that this case may not be reached for trial before March 12 1972. So Order." Motley J. m/n  
 June 7-72 Filed pltff's affdt & notice of motion to adjourn trial until no earlier than that 7-30-72 ret. Part I  
 June 7-72 Filed memo endorsed on motion filed this date---Application granted, no opposition.  
 June 7-72 Filed memo endorsed on motion filed this date to adjourn trial of this action to 7-30-72--So ordered-Bryan,J. m/n
- Feb.25-74 Filed Deposition of Willis Thompson dtd 1/29/71  
 Feb.25-74 Filed Deposition of Paul David Anthony dtd 1/23/71  
 Feb.20-74 Jury Trial begun and continued 2/21/, 2/22/74  
 Trial concluded 2/29/74 (3) vs s-Jury Verdict for Pltff.  
 Jun-4-74 Filed brief in support of deft's motion to set aside verdict (oral mot)  
 Jun 4-74 Filed defts. affdt and notice of motion for judgment for defts., etc.  
 Jun 4-74 Filed stip. and order that the pltf's time to submit his memorandum  
 Jun-19-74 Filed stip. and order that the pltf's time to submit his memorandum in opposition to deft's motion for a new trial is ext. to 6-1-74--  
 Gurfine, J.
- Jun-5-74 Filed Transcript of record of proceedings, dated 2-20, 21 - 1974
- Aug- 6-74 Filed memorandum in opposition to deft's motion for a new trial.  
 Aug- 6-74 Filed defendant's trial brief  
 Aug- 6-74 Filed plaintiff's trial memorandum  
 Aug- 6-74 Filed OPI IO. 410 ...the motions for judgment in accordance with defendant's motion for a directed verdict and for a mistrial are denied. For the reasons stated, the motion for a new trial on damages alone is granted on the ground that the jury verdict is excessive unless the plaintiff consents to a remittitur or the excess over \$15,000. Since I think the jury wished to award the maximum allowable, I shall set the remittitur at the excess of \$15,000. -- Gurfine, J. m/n  
 Aug-16-74 Filed plaintiff's affdt. and notice of motion for reargument of deft's motion to set aside verdict - r.t. 9-13-74  
 Aug 16-74 Filed pltff's memorandum in support of motion for re-argument.  
 Sep.11-74 Filed Deft's memorandum in opposition to pltff's motion for re-argument  
 Sep-26-74 Filed memo endorsed on motion to re-argue filed by pltff. Upon careful consideration of the motion for re-argument the motion is denied.  
 It is so ordered. -- Gurfine, J. m/n  
 Sep-26-74 Filed deft's motion memorandum in opposition to pltff's motion for re-argument.

Francis X. Donovan vs. Penn Shipping Co.

70-CIV-3572

page 3

Judge Curfein

D.C. Trial Court Docket Continuation

DATE	PROCEEDINGS
	Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from order of Judge Curfein entered on 9-26-74 -- copy mailed to Darby Healy Stonebridge & Whelan, Esqs.
June 5-74	Filed transcript of proceedings dated 2/20-21-74.
08-06-75	Filed Judgment #75,666-ORDERED that pltff. have judgment against defts. in the sum of \$65,000.00 together with interest from the 22nd day of Feb. 1974. Werker, J. m/n. Judgment entered, Clerk.
8-18-75	Filed defts. affidavit and notice of motion for an order amending judgment etc. as indicated. Ret. on Aug 25-1975 at 10 a.m.
8-18-75	Filed defts. brief in support of its motion to amend judgment of the HON. H. Werker dated Aug. 6-75 purs to Rule 59(e) of FRCP.
8-25-75	Filed pltffs. amended notice of appeal from judgment entered on 8-8-75 copy mailed to Darby, Healy & Stonebridge & Whelan, Esqs.
9-9-75	Filed defts. affidavit of Thomas Healey.
11-26-75	Filed Opinion # 43044 The defendants motion to amend judgment is granted insofar as it seeks to strike the pre-judgment interest award and to set 8-6-75 as the date from which the interest due shall be calculated. In all other respects, the motion is denied. So Ordered. Werker, j. m/n.
11-26-75	Filed pltffs. brief in opposition to defts. motion to amend judgment.
11-26-75	Filed pltffs. memorandum in opposition to defts motion to amend.
12-22-75	Filed pltffs. notice of appeal from the order & decision of Nov. 21, 1975 insofar said decision denied interest to the pltff., prior to August 6, 1975. Mailed notice to Darby, Healey & Stonebridge.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
NOTICE OF APPEAL.

FRANCIS X. DONOVAN,

Plaintiff,

70 Civ. 3572 MIG

- against -

PENN SHIPPING CO., INC., and  
PENN TRANS. CO., INC.,

Defendants.

----- X

Notice is hereby given that plaintiff appeals to the  
United States Court of Appeals for the Second Circuit from the  
final decision and order of the Honorable Murray I. Gurfein,  
United States District Judge, entered herein on September 26,  
1974.

Dated: New York, N. Y.  
October 1, 1974

PAUL C. MATTHEWS  
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11 Broadway  
New York, N. Y. 10004  
344-1936

TO: DARBY, HEALEY, STONEBRIDGE & WHELAN, ESQS.  
Attorneys for Defendant  
19 Rector St.  
New York, N. Y. 10006

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

FRANCIS X. DONOVAN,

Plaintiff,

AMENDED NOTICE OF APPEAL

- against -

70 Civ. 3572 MIG

PENN SHIPPING CO., INC.  
and PENN TRANSPORTATION CO., INC.,

Defendants.

----- X

Notice is hereby given that plaintiff appeals to the United States Court of Appeals for the Second Circuit from the judgment entered herein on the 6th day of August, 1975.

Dated: New York, N. Y.  
July 22, 1975

PAUL C. MATTHEWS  
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11 Broadway  
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344-1936

TO: DARBY, HEALEY, STONEBRIDGE & WHELAN, ESQS.  
Attorneys for Defendants  
19 Rector St.  
New York, N. Y. 10006

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
FRANCIS X. DONOVAN,

Plaintiff, #43444

- against -

70 Civ. 3572 HFW

PENN SHIPPING CO., INC., and PENN  
TRANS. CO., INC.,

Defendants.

----- X

Notice is hereby given that the plaintiff appeals from  
the order and memorandum decision of the Honorable Henry F.  
Werker dated November 21, 1975 insofar as said decision denied  
interest to the plaintiff prior to August 6, 1975.

Dated: New York, N. Y.  
December 22, 1975

PAUL C. MATTHEWS  
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344-1936

TO: DARBY, HEALEY & STONEBRIDGE, ESQS.  
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19 Rector St.  
New York, N. Y. 10006

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

FRANCIS X. DONOVAN,

Plaintiff, #43444

- against -

70 Civ. 3572 HFW

PENN SHIPPING CO., INC., and PENN  
TRANS. CO., INC.,

Defendants.

----- X

Notice is hereby given that the plaintiff appeals from  
the order and memorandum decision of the Honorable Henry F.  
Werker dated November 21, 1975 insofar as said decision denied  
interest to the plaintiff prior to August 6, 1975.

Dated: New York, N. Y.,  
December 22, 1975

/ PAUL C. MATTHEWS  
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344-1936

TO: DARBY, HEALEY & STONEBRIDGE, ESQS.  
Attorneys for Defendants  
19 Rector St.  
New York, N. Y. 10006

1                   dmanch

2                   Donovan-direct

3                   22

4                   (In open court; jury present.)

5                   THE COURT: All right, Mr. Matthews, you may  
6                   proceed.7                   MR. MATTHEWS: I would like to call the  
8                   plaintiff, your Honor.

9                   THE COURT: All right.

10                  MR. MATTHEWS: Mr. Donovan, take the witness  
11                  stand, sir.12                  F R A N C I S                 X.                 D O N O V A N ,             the  
13                  plaintiff, called as a witness in his own behalf,  
14                  being first duly sworn, testified as follows:

## 15                  DIRECT EXAMINATION

16                  BY MR. MATTHEWS:

17                  Q      How old are you, Mr. Donovan?

18                  A      Fifty-four.

19                  Q      What is your occupation?

20                  A      Seaman.

21                  Q      Have you been a seaman your entire adult life?

22                  A      Almost my entire adult life. I put a hitch  
23                  in the army during the Second World War, two years and

5                   \* \* \* \* \*

2 MR. HEALEY: My point was he wasn't even asked  
3 the question.

4 MR. MATTHEWS: I think his objection was that  
5 I had not asked the witness what the mate said to him,  
6 but I would, of course, ask that question.

7 Q What did Mr. Anderson say to you?

8 A He said, "Yes, I meant to have the boatswain  
9 rope that area off."

10 Q Was that deck roped off in that area?

11 A No, sir, it wasn't.

12 Q Was there any sign up there that said, "Wet  
13 paint"?

14 A No, sir.

15 Q Was there any wet paint in that -- on that  
16 athwartships passageway, the one where the light was?

17 A No, not that I could observe. It was lit and  
18 I couldn't observe that -- it was damp, but it didn't  
19 appear to be wet paint.

20 Q Did you have any trouble slipping or anything  
21 like that in that passageway?

22 A No, sir, I didn't.

23 Q While you were there at the ship's hospital,  
24 how did you feel?

25 A I felt miserable. I was in considerable pain.

1 dhmch

Donovan-direct

38

2 Q What did you do after the mate put the splint  
3 on your wrist?

4 A The mate asked -- there are cots in the hospital  
5 and the mate asked me if I would like to lie down, and there  
6 was a clean sheet on one of the cots, and I said, "Gee,  
7 I hate to lie on there with my trousers messed up like  
8 this."

9 And he said -- well, either he pulled the spread  
10 up over or I did, and he said, "Don't worry about the  
11 cot. If you want to lie down, go ahead."

12 Q What kind of a man was Chief Anderson to work  
13 for?

14 A A very good man.

15 THE COURT: What I don't understand is you call  
16 him a chief officer and also chief mate. Which was he?

17 THE WITNESS: Chief officer and chief mate are  
18 the same, your Honor.

19 MR. MATTHEWS: He's the second in command, your  
20 Honor.

21 THE COURT: I understand that.

22 When he said chief officer, that's what I wanted  
23 to find out.

24 Q Now, you mentioned that you were on your way  
25 forward to your docking station. Did the ship dock

- 1 dhmch Donovan-direct 39
- 2 sometime after your accident?
- 3 A Yes. Shortly after, within an hour or two.
- 4 Q After the ship docked, did an ambulance pick you
- 5 up?
- 6 A Yes, it was an ambulance waiting for me.
- 7 Q Did you talk to any of your shipmates when you
- 8 left the ship?
- 9 A Yes, I talked to the ship's delegate. He got
- 10 me some clothing to take to the hospital, and I told him
- 11 that that deck was still wet up there and to warn the
- 12 rest of the crew to be careful walking over it.
- 13 Q Where did the ambulance take you, Mr. Donovan?
- 14 A It took me to the U. S. Public Health Hospital
- 15 in Staten Island.
- 16 Q What was done for you there?
- 17 A Well, I was -- there was x-rays taken. My wrist
- 18 was set. Also, my elbow was dislocated and they put my
- 19 elbow back in joint and they put a cast on my arm.
- 20 Q Then, after they put the cast on your arm, were
- 21 you admitted into the hospital as a bed patient?
- 22 A Yes, sir, I was.
- 23 Q How long did you remain in the hospital?
- 24 A Eight days.
- 25 Q How did you feel while you were in the hospital?

2 A Pretty rough. I was in a lot of pain.

3 Q Were you given any medication for the pain?

4 A Yes, I was given medication and shots, pain shots.

5 Q Did the medication make the pain go away?

6 A No, it didn't make the pain go away but it helped  
7 relieve it.

8 Q While you were in the hospital at Staten Island,  
9 I think you said they put a cast on the very first day; is  
10 that right?

11 A Right.

12 Q While you were in there, were there any changes  
13 made in that cast?

14 A Yes. About three or four days later, the doctor  
15 came and he cut a "V" in the cast at my wrist and tried  
16 to straighten my hand out, and put wedges in the cast to  
17 keep my hand straight.

18 Q Were you given any anesthetic when that was  
19 done?

20 A No, not at that time.

21 Q How did that feel?

22 A Pretty miserable. I hit the overhead.

23 Q After your discharge from the Staten Island  
24 Hospital eight days later, I guess that was the 12th of  
25 June, where did you go?

1 dhmch Donovan-direct 41

2 A I went to my home in Boston, Massachusetts,  
3 Cohasset, Massachusetts.

4 Q After that, did you report to a different public  
5 health service facility?

6 A Yes, when I left the Staten Island Marine  
7 Hospital, they told me to report to the Brighton Marine  
8 Hospital in two weeks, which I did. 11

9 Q What was done for you at the Brighton Hospital  
10 when you reported there two weeks later?

11 A Well, they took additional x-rays and they  
12 removed the cast that had been applied in Staten Island  
13 and put a new shoulder cast on it.

14 Q When you had that first cast on, could you use  
15 your right hand at all?

16 A No, sir.

17 Q Could you use your right arm at all?

18 A No.

19 Q Are you right-handed or left-handed?

20 A Right-handed.

21 Q In that second -- that cast was on until two  
22 weeks after you got out of the Staten Island Hospital;  
23 is that right?

24 A That's right.

25 Q So that was on a little over three weeks

1 dhmch Donovan-direct 42

2 altogether?

3 A Yes, sir.

4 Q Then, the second cast that they put on, how  
5 long did that remain on?

6 A About a month.

7 Q Could you move your arm at all while it was in  
8 that cast?

9 A No, sir.

10 Q After you returned back now, after the month,  
11 that would take us to around the 24th of July, what did they  
12 do for you at the Brighton Hospital?

13 A They removed the shoulder cast and they put  
14 an aluminum splint on my arm, my forearm.

15 Q When your hand came out of the cast, how did it  
16 feel?

17 A Very weak. I had no grip in it. It's still  
18 sore.

19 Q Could you cut your meat, for instance, if you had  
20 meat?

21 A No.

22 Q While you were under the care of the Brighton  
23 Public Health Service, Mr. Donovan, did you go to see any  
24 private doctor?

25 A Yes, sir, I went to see a bone specialist, Dr.

1 dhmch Donovan-direct 43

2 McGillicuddy.

3 Q Why did you go to see him?

4 A Well, I was anxious to get back to work and I  
5 felt that the Brighton Marine Hospital wasn't doing enough  
6 for me, so I spoke to my lawyer and he gave me the name  
7 of a doctor, and he sent me to Dr. McGillicuddy.

8 Q Did Dr. McGillicuddy recommend any particular  
9 kind of treatment to you?

10 A Yes, sir, he recommended physical therapy and  
11 he gave me a letter to that effect, which I brought to the  
12 Brighton Marine Hospital.

13 Q Did you go to Brighton Marine Hospital and get  
14 that physical therapy?

15 A Yes, sir, I did.

16 Q How long did you remain under the care of the  
17 Brighton Marine Hospital altogether?

18 A About three months after that.

19 Q Was it the 1st of December that they told you  
20 that you could go back to work?

21 A Yes, sir.

22 Q Did they indicate to you whether there was  
23 anything further they could do for you?

24 A Yes. They said that that's all they could do  
25 for it.

1 dhmch

Donovan-direct

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2 Q After you were marked fit for duty on  
3 December 1st of 1970, did you return to work?

4 A Yes, sir, I did.

5 Q Did you have any problems doing your work?

6 A Well, I had problems in the sense that I didn't  
7 have a strong grip and if I did any heavy work, my arm  
8 would ache me for several hours afterwards.

9 Q Does that condition persist until the present  
10 time?

11 A Yes, sir, it does.

12 Q With this heavy work your arm aches?

13 A Yes, sir, it does.

14 Q What about your grip, has that returned?

15 A No. I don't have nearly the grip that I had.

16 Q Mr. Donovan, how much did you average in pay  
17 on the Penn Sailor?

18 A I would say roughly \$950 a month.

19 THE COURT: How long had you been on the vessel  
20 by the time the accident happened? About.

21 THE WITNESS: I believe it was around two months,  
22 your Honor.

23 THE COURT: I wanted to make sure I had the right  
24 year.

25 MR. MATTHEWS: I'm having a little difficulty

1 dhmch

Donovan-direct

45

2 locating the right document, your Honor, but I think this  
3 will do.

4 Q Does this --

5 MR. MATTHEWS: I should have it marked.

6 (Plaintiff's Exhibit No. 9 is marked for iden-  
7 tification.)

8 Q Does that W-2 statement reflect your earnings  
9 on the Penn Sailor from April 1st of 1970 until June 4th  
10 of 1970?

11 A Yes, sir.

12 Q Could you tell the jury, as you recall, what your  
13 base pay was on the Penn Sailor?

14 A I would say about \$475, \$500 a month at that  
15 time.

16 MR. MATTHEWS: Would you stipulate to \$475, Mr.  
17 Healey?

18 MR. HEALEY: Yes, this shows 475.29.

19 Q What is encompassed in that base pay?

20 A Well, that's for a forty-hour week, anything  
21 outside of Saturdays and Sundays and holidays. It's  
22 basically for a forty-hour week.

23 Q So that approximately half your pay is your  
24 base pay and the remainder is something else; is that  
25 right?

1 dhmch

Donovan-direct

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2 A Yes, sir.

3 Q Is that something that is generally called  
4 overtime?

5 A Yes, sir.

6 Q What does this overtime work involve; would  
7 you explain that?8 A Well, overtime is any work that you do outside  
9 of your eight-hour working hours. On a tanker, if you  
10 go into the tanks, cleaning tanks, or -- that's also over-  
11 time. But anything outside of your eight-hour period or  
12 outside of your regular day is overtime.13 There's other special duties that you do that are  
14 overtime even though you're on watch, such as if you're on  
15 watch and you have to take stores aboard, that's an  
16 additional hour, even though you're on your regular day.17 Q I guess if you are standing a watch in port,  
18 also, if it is after 5:00 o'clock or before 8:00 o'clock  
19 in the morning --20 A Yes, port watch is anything after 5:00 and before  
21 8:00 a.m.22 Q Is certain of this overtime that you earn  
23 compulsory? Are you required to work it?24 A Yes. It's required work, such as cleaning  
25 tanks and mucking the tanks out, and getting the ship --

1 dhmch Donovan-direct

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2 butterworthing, washing the tanks and taking any rust out  
3 of them and all, which is known as mucking. Preparing the  
4 ship for the next cargo and gas freeing the vessel.

5 Q Of course, you also have to work on Saturday  
6 and Sunday, you don't have any alternative about that;  
7 right?

8 A Yes, sir.

9 Q Is a portion of this overtime voluntary where  
10 the man has a choice to do the work or not to do the work?

11 A Yes. Some of the work is voluntary.

12 Q Since your accident, have you been doing this  
13 voluntary overtime work?

14 A No, I've been turning down most of it.

15 Q What is your best estimate, Mr. Donovan, as to  
16 the number of hours of voluntary overtime that you could  
17 have worked but that you have declined for each month  
18 since you have returned to work following your accident?

19 A Well, I would say between 35 and 40 hours.

20 Q Would it be the same on every ship?

21 A No, on some ships more, on some ships less.

22 Q Are you giving us an average?

23 A Yes, an average.

24 Q Sometimes it would be more than that and sometimes  
25 less?

1 dhmch

Donovan-direct

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2 A Yes, sir.

3 Q How much do you earn per hour for that  
4 voluntary overtime work?5 A Voluntary overtime work for an able seaman  
6 is \$3.44 an hour.7 Q Has that rate remained constant since the time  
8 of your accident right up until the present?9 A Well, at the time of my accident, I don't think  
10 it was that much, but that rate is constant now.11 Q Is there a different rate for the Saturday and  
12 Sunday work now?13 A Yes. Saturdays, Sundays and holidays are  
14 premium -- called premium overtime, for which you receive  
15 on a tanker, I think it's 5.16 an hour.

16 Q Has that gone up each year?

17 A Yes.

18 Q And the base watches of an able-bodied seaman,  
19 has that gone up each year until the present time?

20 A Yes, sir.

21 Q Mr. Donovan, I have certain figures here  
22 reflecting the monthly base pay of an able-bodied seaman  
23 for different periods of time, and the overtime rates  
24 and the premium rates in the period of time --

25 THE COURT: Is that marked for identification?

1 dhmch

2 Donovan-direct

3 49

2 MR. MATTHEWS: Oh, yes, I'm sorry, your Honor.  
3 I forgot.

4 (Plaintiff's Exhibit No. 10 is marked for iden-  
5 tification.)

6 MR. MATTHEWS: I would offer 9 in evidence.

7 THE COURT: Any objection?

8 MR. HEALEY: I have no objection.

9 THE COURT: Received.

10 (Plaintiff's Exhibit No. 9 is received in  
11 evidence.)

12 Q Mr. Donovan, those rates on that paper that I  
13 have given you, Exhibit 10, those are rates for a freight  
14 ship, are they not?

15 THE COURT: What do you mean, a dry cargo ship?

16 MR. MATTHEWS: Yes, your Honor. I just want  
17 to establish the rates. They're very slightly different  
18 and I hope the witness will be able to tell us the  
19 approximate amount of the difference.

20 Q For instance, Mr. Donovan, on the current contract  
21 period --

22 MR. HEALEY: I would object. I don't think he's  
23 the man to do it.

24 As I told Mr. Matthews, as we have done in the  
25 past, if you show me these things, I will stipulate these

1 dhcmh Donovan-direct 50

2 things.

3 MR. MATTHEWS: I understand.

4 I just want to establish from the witness what  
5 the tanker rate is, your Honor.

6 THE COURT: All right. Go ahead.

7 MR. MATTHEWS: Because I don't have the tanker  
8 rate, Mr. Healey.

9 THE COURT: Do you have it, Mr. Healey?

10 MR. HEALEY: Why don't we try to get it?

11 I'm sure you can save a lot of time.

12 THE COURT: You can get it more accurately.

13 MR. MATTHEWS: Fine.

14 Q Mr. Donovan, when you returned to work after  
15 this accident, was that on the 12th of December?

16 A I believe so; around that day.

17 Q Did you go back to work for the same company?

18 A Yes, sir, I did.

19 xxxz 20 (Plaintiff's Exhibit No. 11 is marked for iden-  
tification.)21 Q Is that your W-2, Exhibit 11, for your earnings  
22 in 1970 now on the Penn Champion?23 THE COURT: I thought that was Exhibit 9, wasn't  
24 it?

25 MR. MATTHEWS: 9, your Honor, was the Penn Sailor.

1 dhmch

Donovan-direct

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2 I'm now speaking of the Penn Champion.

3 THE COURT: 1970, you say?

4 MR. MATTHEWS: Yes, your Honor.

5 THE COURT: From December 12th on?

6 MR. MATTHEWS: Yes, sir.

7 THE COURT: I see.

8 A This doesn't look accurate. I think I earned  
9 more money on the Penn Champion.

10 Q Does it go according to your pay period?

11 A No. I believe I was on the Penn Champion  
12 pretty near two months, and this only shows \$278 earnings.13 Q All right. We will have to get that straightened  
14 out with the defendant, then.15 Mr. Donovan, in addition to the base pay and  
16 the overtime which you received as a seaman, do you also  
17 receive vacation pay?

18 A Yes, sir.

19 Q How much does that amount to, sir?

20 A For an able seaman, it's a hundred dollars a  
21 month.22 (Plaintiff's Exhibit No. 12 is marked for iden-  
23 tification.)24 Q Is this your income tax return for 1969, Mr.  
25 Donovan?

1           A     Yes, sir. It is.

2           Q     When you serve on a vessel, does the Coast Guard  
3           give you a certificate of discharge or a certificate of  
4           service?

5           A     Yes, sir, they do.

6           Q     All right.

7           MR. MATTHEWS: Could we just mark these altogether?  
8           Have you got a rubber band?

9           xx

10           (Plaintiff's Exhibit No. 13 is marked for iden-  
11           tification.)

12           THE COURT: Let me see these, please.

13           Q     Mr. Donovan, Exhibit 13, are those your dis-  
14           charges?

15           A     Yes, sir, they are.

16           Q     I believe they cover the period from 1960 right  
17           up until the present date, do they not?

18           A     Well, I don't know. There may be a few missing.

19           Q     I think we found four of them missing and I have  
20           put a piece of paper in here. Are these complete except  
21           for these ships that are listed here, the Arizpa, the  
22           Western Clipper, the Vantage Venture and the Penn Sailor?

23           A     Yes, sir, they are.

24           MR. MATTHEWS: I will offer 12 and 13 in evidence  
25           your Honor.

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2 THE COURT: Any objection?

3 MR. HEALEY: Not to 12. I don't understand  
4 what 13 is at this point. I know it's discharges.5 Could you just give us some idea? What is it?  
6 Is it his entire seagoing career?

7 MR. MATTHEWS: No, it goes back to 1960.

8 MR. HEALEY: 1960 up to what, today?

9 MR. MATTHEWS: Yes.

10 THE COURT: All right.

11 MR. HEALEY: Do you know, can you tell what ones  
12 are missing?13 MR. MATTHEWS: Yes, there are four that are  
14 missing, one of them being --15 MR. HEALEY: You are not saying it. I understand  
16 it's reasonably accurate.17 What I'm trying to get at, is Mr. Donovan able  
18 to tell us exactly how many are missing? That's all.19 THE WITNESS: Yes, sir, I am. I have the  
20 dates and the names of the ships.

21 MR. HEALEY: And it is four, sir?

22 THE WITNESS: Yes.

23 MR. HEALEY: I have no objection with that  
24 explanation.

25 THE COURT: Do you want him to state the dates

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2 and the missing ships?

3 MR. MATTHEWS: There is a piece of paper in there  
4 with the dates and it's in the period, also.

5 THE COURT: We will deem that in evidence, also.

6 MR. HEALEY: Yes, sir.

7 (Plaintiff's Exhibits Nos. 12 and 13 are received  
8 in evidence.)

9 THE COURT: Mark the sheet 13-A, please.

10 (Plaintiff's Exhibit No. 13-a is received in  
11 evidence.)

12 Q Mr. Donovan, is part of your required work on  
13 board ships heavy work?

14 A Yes, sir, it is.

15 Q As an able-bodied seaman, do you have to go aloft  
16 on occasion?

17 A Yes, sir, we do.

18 Q Do you have to, on occasion, handle these heavy  
19 mooring lines?

20 A Yes, dock and undock the ship.

21 Q Do you have to climb in and out of tanks on a  
22 tanker?

23 A Yes, sir, when we are cleaning tanks we have to  
24 go into the tanks and climb ladders maybe 30, 40 foot down.

25 Q How does your arm feel after doing that kind of

2 work?

3 A My arm is very sore after climbing the ladders.

4 The ladders are very steep and you support most of your  
5 weight on your arms.

6 Q As a result of this, have you taken any time off?

7 A Yes, sir, several times I've had to take time off  
8 because my arm was bothering me.

9 Q Does your arm bother you at any time when you  
10 are not working?

11 A Yes, when the weather changes, damp weather or  
12 cold weather. It starts to ache.

13 Q I think you told us that you haven't regained  
14 your grip; is that right?

15 A No, sir, I haven't.

16 Q Before this accident, how did the grip of your  
17 left hand and your right hand compare?

18 A Well, my right hand was stronger because I'm  
19 right-handed.

20 Q Had you previously had a fracture of your left  
21 wrist?

22 A Yes, sir, I had.

23 Q How many years ago was that, approximately?

24 A Oh, I'd say fifteen.

25 Q Were you examined by a doctor on behalf of Penn

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2           A     The patient arrived at the hospital on June 4,  
3     1970 at 8:15, or was seen at 8:15 a.m. He may have  
4     arrived sooner.

5           Q     What history did he give of injury?

6           A     He gave a history that he slipped and struck  
7     his right arm against the steel deck at 5:00 a.m. today  
8     and he complained of pain in the right elbow and the  
9     right wrist.

10          Q     What did the physical examination at that time  
11        reveal?

12          A     The physical examination revealed that there  
13        was swelling and tenderness in the elbow without any bony --  
14        any palpable fracture. This means that the doctor who  
15        examined him couldn't feel any of the bones broken in  
16        the elbow. He also found that there was swelling and  
17        tenderness and displacement. He writes slightly dislocated  
18        right wrist with a puncture wound over the side of the wrist  
19        with fresh bleeding coming out of this area.

20          Q     Is this significant in this type of an injury,  
21        Doctor?

22          A     Yes. As it happened, this patient broke his wrist  
23        and dislocated his elbow, and the broken wrist was an open  
24        or compound fracture. It was open to the air.

25          Q     Is there a later note in the doctor's progress

2 notes as far as this aspect of the injury was concerned?

3 A Yes. The patient was later admitted to the  
4 hospital and in the doctor's progress notes there is a  
5 note that there is apparent bleeding on the -- through the  
6 cast. This is on Page 16, on 6/5/1970.

7 Q Can that be the cause of complications in this  
8 type of injury?

9 A It could be the cause of complications, yes, sir.

10 Q Doctor, going back to the initial physical  
11 examination, did they record an impression at that time?

12 A Yes. Their impression was colles fracture right  
13 wrist, rule out fracture right elbow.

14 Q First of all, would you tell us what an impression  
15 is?

16 A An impression differs from a diagnosis -- when  
17 a doctor makes a definite diagnosis, he is sure that is  
18 what is wrong with the patient. When he just writes  
19 impression, he feels that probably this is what is wrong  
20 with the patient, but it may not be, and it requires  
21 further evidence to prove it.

22 In this case, x-rays changed the impression to  
23 a diagnosis.

24 Q Doctor, what is a colles fracture?

25 A A colles fracture is a fracture of the end bone

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2 of the arm. There are two bones in the forearm, the  
3 radius bone and the ulna bone. A colles fracture is a  
4 break just above the wrist of the main bone of the forearm,  
5 the radius bone, with a displacement of this bone upwards  
6 so that its joint surface, bearing surface, no longer  
7 faces the way it should, and there is typical silver fork  
8 deformity, a hump in the wrist that looks like a table  
9 fork, and also a break in the end of the ulna bone, which  
10 is called the ulna styloid.

11 That's the classical colles fracture.

12 Q Doctor, referring back to the chart, could  
13 you tell us what the treatment was that was recommended  
14 at that time?

15 A He was -- well, they gave him -- took x-rays.  
16 They gave him something intravenously. They gave him  
17 pain medication intramuscularly, codeine and a narcotic.  
18 And they took him to the x-ray department where they re-  
19 duced the fracture under anesthesia, and put him in a cast.  
20 That is, they put the fracture into a better position.

21 They also noted in the x-rays that the elbow  
22 itself was broken as well as dislocated, and during this  
23 time that he was in the x-ray department, they also put  
24 the elbow back into the joint, but they were not able to  
25 really set the little fracture that he had in the elbow.

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2 Q What is a dislocation, Doctor?

3 A A joint is the thing that gets dislocated.

4 Now, there are many, many joints in the body,  
5 and a joint is usually one bone that articulates with  
6 another bone. One side of the bone meshes with the other  
7 bone in a smooth type of bearing surface. These bearing  
8 surfaces are covered with a gristle or a membrane called  
9 cartilage.

10 If you ever opened up the end of an animal bone,  
11 you see it's white and shiny and it enables one bone to  
12 glide on the other bone. That is called articular  
13 cartilage.

14 The joint is held in place by its capsule and by  
15 ligaments around the joint. In other words, a joint --  
16 any joint in the body has certain planes of motion.  
17 Let's say the fingers go this way and this way, but  
18 can't go this way and this way because its ligaments prevent  
19 it from going sideways, but are open in the front and the  
20 back to allow it to bend and flex.

21 The wrist has this kind of motion, up and down,  
22 in and out and sideways. The elbow has up and down flexion  
23 and extension, but no sideways motion.

24 Now, when a joint goes out of its articulation,  
25 when it dislocates, then the ligaments that prevent -- that

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2 guide, that prevent the excess motion get torn. The  
3 lining of the joint gets torn and possibly some of the  
4 bone also breaks when this joint goes out of place. That's  
5 what a dislocation is.

6 Q In this case, talking about Mr. Donovan's elbow,  
7 was there in addition to the dislocation evidence of a  
8 fracture in the elbow?

9 A Yes. In Mr. Donovan's case, what happened was  
10 that the elbow joint, which is the congruence of the arm  
11 bone with the smaller elbow bone, with the radius and the  
12 ulna, but actually the ulna bone really takes most of the  
13 articulation, what he did was broke off the front part of  
14 the ulna bone, called the coronoid process, in order for  
15 the elbow to be out of joint. He also tore the ligaments  
16 on the side. We can tell that because later on I will  
17 show you the x-rays that show where these ligaments had  
18 healed with evidence of calcium forming in the ligaments.

19 Q Doctor, is intramuscular demarol -- is that what  
20 they gave this man, intramuscular demarol?

21 A Yes.

22 Q Is that given for mild pain?

23 A That is given for severe pain.

24 Q Was he given that for a number of days?

25 A Yes, sir.

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2 Q Doctor, when the patient was admitted to the  
3 hospital, what does the physical examination on admission  
4 reveal concerning the condition of his right arm? I think  
5 that's on Page 6.

6 A Thank you.

7 I can't read it. There's a deformity -- it  
8 says right, and there's two words I can't read. Then it  
9 says deformity of right wrist and right elbow. Patient  
10 could not flex or extend right elbow. That means he  
11 couldn't bend it down or straighten it up. And patient  
12 had good right radial pulse and no evidence of radian,  
13 median or ulna nerve. Deficits in right upper extremity.

14 What the doctor is saying, that is, the dislocation  
15 didn't harm the circulation, the pulse or the nerves going  
16 to the hand.

17 Q Doctor, were x-rays taken on that date?

18 A Yes, sir.

19 Q What do the records indicate as far as those  
20 x-ray findings are concerned? I think those x-rays are  
21 on Pages 9 and 10.

22 A The original x-rays of the elbow are dated  
23 6/4/70, and it states, "Films of the right elbow disclose  
24 a complete dislocation of the radio-humeral joint or a  
25 fracture of the coronoid process of the ulnar and

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2 and ulno-humeral subluxation.

3 Q Doctor, we subpoenaed the x-rays from Staten  
4 Island, and, as you know, having looked at the envelope,  
5 there were no wrist x-rays in there. So I will ask you to  
6 refer to both your own x-rays and some x-rays which we have  
7 from Brighton in order to illustrate the injuries here.

8 MR. HEALEY: I have no objection, your Honor.

9 MR. MATTHEWS: We have two more exhibits, your  
10 Honor. They're collective exhibits; 16 are x-rays from  
11 Brighton which were taken in August and September of 1970.

12 (Plaintiff's Exhibit No. 16 is received in  
13 evidence.)

14 MR. MATTHEWS: 17 are Dr. Mauer's x-rays.

15 (Plaintiff's Exhibit No. 17 is received in  
16 evidence.)

17 THE COURT: What is the date of Dr. Mauer's?

18 THE WITNESS: They were taken, sir, in 19- --  
19 they were taken last night and in 1971, I believe.

20 THE COURT: Couldn't you have separate numbers  
21 for them? That is why I am asking the question.

22 MR. MATTHEWS: Perhaps, your Honor. They are in  
23 one envelope but we can separate them, of course.

24 THE COURT: I think you should.

25 THE WITNESS: I can identify them by date

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2 when I talk about them.

3 MR. MATTHEWS: The dates are on the films, your  
4 Honor. Each film has its own date on there as a permanently  
5 inscribed or what-have-you date.

6 Q Doctor, in general terms, before you begin,  
7 what do the x-rays show?

8 A X-rays will show the relationship of the bones  
9 one to another, whether there's anything wrong with the bones,  
10 and sometimes will show the -- depending on the technique  
11 of the x-ray, some soft parts. It can highlight certain  
12 soft parts.

13 X-rays, special x-rays will show other things  
14 and can be used to outline soft parts, but routine x-rays  
15 generally do not.

16 Q In other words, the routine x-ray, such as these,  
17 wouldn't show the ligaments, for instance?

18 A No, sir.

19 Q Okay.

20 A Just to explain what happened to his elbow, here  
21 is an x-ray which I took last night, February 19th, of his  
22 elbow. Since we don't have the original x-ray, this is  
23 the end of the arm bone; this is the right elbow. This  
24 is the end of the arm bone, the humerus. This is the ulna  
25 bone and this is the radius bone. This is the side view

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2 of this same arm, and here is the arm bone this way,  
3 going down, and this is the side view of the radius and the  
4 ulna. You see, most of the articulation is in the --  
5 between this bone and this bone, and what happened, here  
6 films of the right elbow show a complete dislocation of  
7 the radio-humeral joint.

8 In other words, this thing went backwards and  
9 this bone over here went backwards, and this joint was no  
10 longer opposing one to another, and with a fracture of the  
11 coronoid process of the ulna, and the ulna-humeral  
12 subluxation, which means the joint between this and this  
13 is off, too.

14 The fracture in the coronoid process, this part  
15 of the ulna bone extends all the way around, and  
16 you see this -- may I have the pointer, please?

17 Q Sure.

18 A This triangle of bone that you see right here  
19 belongs right at the front of the coronoid, of the ulna  
20 bone, deepening the socket for the end of the arm bone to  
21 sit in. In other words, it sits into a socket very much  
22 like this, and what happened is it came out and broke off  
23 the end, very much like the tips of my fingers broke off.

24 In this x-ray, taken last night, you can see that  
25 this front part of the ulna bone, the coronoid process,

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2 never really healed, and remains separate -- a separate  
3 bone in the elbow.

4 What they say further is, "Following reduction,  
5 there is still some apparent widening of the ulno-humeral  
6 joint in the olecranon fossa."

7 What that means is that the -- this joint, even  
8 after they put it back in place, was not quite as narrow  
9 as we see here, probably, in my opinion, due to blood in  
10 the joint or something like that. But the x-ray doesn't  
11 say exactly what is causing the widening.

12 He also mentions that the coronoid fracture is  
13 better seen in the side view, and there's probably a chip  
14 of the lateral epicondyle.

15 This is what he is talking about. This is the  
16 two ends of the humerus bone, are called epicondyles.  
17 There is one in the inner side called the medial epicondyle  
18 and one on the outer side called the lateral epicondyle.  
19 The chip he is talking about is still visible on the x-rays  
20 which I took last night. It's this big white thing that you  
21 see on this side.

22 Now, the ligaments that prevent this thing from  
23 going this way and this way are attached right here to the  
24 bones, and what he did, actually, was he tore the ligaments  
25 off the bone, together with a chip of bone, and that's what

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2 this still represents.

3 Q Could you go on to the wrist, Doctor?

4 A The x-rays -- I'm reading now from Page 10.

5 The x-rays of the wrist examination of the right wrist  
6 discloses a commuted fracture of the distal radius with  
7 dorsal angulation of the fracture fragment, and a fracture  
8 of the ulnar styloid.

9 Here is an x-ray of this man's wrist taken on --  
10 let's take the one I took last night. Last night -- these  
11 are -- in order to explain the bones --

12 Q Excuse me. Could you slant the box a little  
13 bit?

14 A Sure.

15 This is the radius bone; this is the ulna bone.  
16 These bones in here are the bones of the carpal, the  
17 small bones coming to the -- the so-called wrist bones,  
18 and these longer bones are the metacarpal bones; that's  
19 the bones in the palm.

20 Now, what they're describing is a multi -- a  
21 fracture with many, many pieces of the end of the radius  
22 bone. This is the radius bone right here. This is the  
23 end of the radius bone right here. Right here. What  
24 they're describing is a break at the end of the radius  
25 bone. I think I can show that a little bit better.

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2 Here is an x-ray on Exhibit 16, taken in Brighton.

3 It's difficult to get the date of it, but it's just --

4 Q They were all taken, I think, in August and  
5 September of 1970.6 A You can see here where the break had not healed  
7 yet and you see here is the end of the wrist bone, the break  
8 right over here with this part of the radius bone tilted  
9 upwards. You can see here, this is the side of the radius  
10 bone. Here is the radius bone tilted upwards and broadened.  
11 You can no longer see the many pieces of the fracture,  
12 because the fracture had partially consolidated, but  
13 grown together, as the bones heal. Nature sets up a  
14 callus between the bones and this is like a scar tissue,  
15 and this glues the bones together, and later this callus  
16 becomes infiltrated. The body makes calcium grow into this  
17 material, and this later changes into new bone, and that's  
18 how a fracture heals.19 What had happened is that this x-ray was taken  
20 during the healing process. The fracture had not fully  
21 healed as yet, but you can see that there was one  
22 part of the fracture that went right into the joint itself.  
23 The joint is, in this case, the joining of the wrist  
24 bones, the small bones of the wrist, with the forearm  
25 bones.

—  
dinner

2 Q Doctor, you have mentioned how nature heals  
3 bones. What about these ligaments and so forth that get  
4 torn? How are they healed?

11 Q Is there any significance to a person -- effect  
12 on a person, the fact that they have this scar tissue  
13 around the joint, rather than the normal tissue-which  
14 nature gave you?

15           A     Scar tissue is not anywhere near as resilient  
16           and stretchable as the normal tissue, and this would either  
17           cause some pain in the motion of the joint or might cause  
18           limitation in the motion of the joint.

19 Q Have you found limitation of motion in the  
joints of Mr. Donovan's wrist on your examinations?  
20

21 A Yes, sir.

22 Q Was there also findings of limitation of motion  
23 in the Brighton records?

24 A Yes, sir.

25 Q I wonder, Doctor, could you describe the findings

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2 that you have made as far as this limitation of motion of  
3 the joint is concerned?

4 MR. MATTHEWS: Would it be permissible, your  
5 Honor, if the doctor showed it right with Mr. Donovan's  
6 wrist?

7 THE COURT: Let him show it with anybody's wrist.  
8 What difference does it make? He can show it with your  
9 wrist.

10 MR. MATTHEWS: I thought possibly the doctor  
11 could show the jury what limitations of wrist motion there  
12 are if I could have Mr. Donovan step up.

13 Would that be all right, your Honor?

14 THE COURT: Yes.

15 MR. MATTHEWS: Would it be all right for him to  
16 take his jacket off?

17 THE COURT: Sure.

18 THE WITNESS: Why don't you come right over here,  
19 sir?

20 This is Mr. Donovan's wrist, as you can see if  
21 you look at the x-ray, this way, you can see that this is  
22 the same representation. This bone is canted over. The  
23 wrist bone is canted over sideways.

24 My wrist is like this, with the wrist bone, the  
25 end of the wrist bone, sitting squarely on top of the end

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2 of the radius bone, is sitting squarely on top of the  
3 forearm.

4 In his case, this is canted over sideways and  
5 deformed. In addition, this ulna bone, which you can see  
6 right over here, is very much longer.

7 In my case and in anybody's case, the wrist --  
8 the radius bone ends just about here, and the ulna bone  
9 which is prominent in everybody's case ends here. The  
10 radius bone is longer, normally, than the ulna bone.

11 In his case, because of the fracture and the  
12 way it healed and the angulation of the fracture, the  
13 radius bone has squashed down, proving a relative  
14 lengthening of the ulna.

15 So this pushes his hand this way and prevents  
16 him from getting the hand all the way over, over here.

17 Q What is that movement called?

18 A This is called ulnar deviation.

19 Normally, a person can bring his wrist over to  
20 the side, to the ulnar side, about 20 or 30 or 40 degrees.  
21 He can do it about 5 degrees, but he's not really doing it  
22 with the wrist; he's doing it with the fingers and the hand.  
23 You can push him over, but actually it's not ulnar  
24 deviation at the wrist joints. He has an effective, however,  
25 10 or 15 degrees of ulnar deviation. I can get about 30

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2 or 40.

3 He has a radial deviation of about 30 or 40  
4 degrees. That's going this way; radial deviation.  
5 Sideways.

6 Now, the wrist's main motions are up and down.  
7 That's called dorsi-flexion and palmar flexion.

8 We can bring his wrist up to about 40 degrees,  
9 40 to 60 degrees in dorsi-flexion, and normally a wrist  
10 goes at least to 90 and possibly more, upwards. Dorsi-  
11 flexion. We can bring his wrist down about 30 degrees.  
12 Normally, one can bring the wrist down all the way to  
13 90 degrees, maybe 80 degrees, depending on how stiff an  
14 individual is.

15 Of course, you grab something and you can't --  
16 and you bring your wrist down, your fingers open up, and  
17 inability to bring the wrist down, of course, will cause  
18 weakness of grip. And he demonstrates that --

19 Close your hand.

20 He demonstrates inability to fully grip and --

21 Hold it closed tightly --

22 His fingers can be opened up reasonably well  
23 against --

24 Q Do you have a machine that you actually use  
25 to test that with?

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2           A     I brought along the dynamometer that I used  
3     last night and I was able -- I squeeze it all the way down  
4     to 420, which is not easy, but I'm a surgeon and I use my  
5     hands. But a seaman should be able to be as strong certainly  
6     as I am with my hands, because I really don't do manual  
7     labor.

8                   We can try it again. We tried it just before  
9     in the courtroom, and he got it to about 10.

10          Q     Give it all you've got, Mr. Donovan.

11                   (Witness indicates.)

12          A     He's doing it a little better. He has about 12 --  
13     no, he's got about 20.

14                   On the other side, we tried it for comparison.  
15     He gets it to about 40, which is not so wonderful, either.

16          Q     Well, he had a previous colles fracture of the  
17     left wrist as well some eighteen years ago; is that right,  
18     Doctor?

19          A     Right.

20          Q     Does that complete -- what about the deformity  
21     of the wrist, Doctor? You've got some more?

22          A     There's one important thing I want to show.  
23     This ability to turn the wrist over is a forearm motion  
24     and it has to do with the large bone, the radius and the  
25     ulna, going around in the elbow and that's called

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2 pronation and supination, putting it this way is called  
3 supination and putting it this way is called pronation.  
4 And it's tested with the elbow bent.

5 You see, he doesn't get it out to a right angle,  
6 he can be pushed almost to a right angle, and this way,  
7 when we bring his elbow up against this, we're pushing  
8 all the way, he lacks about 30 degrees in pronation.

9 And supination, he also lacks -- when -- you  
10 can make it look like it, you see. You cannot have any  
11 pronation and supination and do this with your body, and  
12 this is how he's making up for it.

13 I'm not moving anything at all except my body and  
14 I'm changing this angle. So you can make up for  
15 pronation and supination by twisting your body but actually  
16 in the forearm joint he has a lack of the terminal 30  
17 degrees of pronation and supination.

18 Q Doctor, is the wrist placed on the end of the  
19 arm bones in a certain position of function?

20 A Yes. The way the wrist should sit on the end  
21 of the arm bone is, if you notice, this joint over here,  
22 it should be facing downwards. Instead of facing in this  
23 angle, it should be facing in this angle.

24 And what happened was this break squashed the  
25 thing up and brought the wrist up into this silver fork

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Mauer-direct

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2

deformity and healed.

3

Q Did this deformity have an effect on his ability  
to use his hands?

5

A Yes, it causes a limitation of motion and it  
causes a weakness.

7

Q The weakness of the grip?

8

A Yes, sir.

9

Q Doctor, I would like to go on to the Brighton  
records, if you would, and would you describe just very  
briefly, according to the chart, what was done there  
for the first visit in June 1970?

13

A They took his cast off -- no, apparently he had  
a short cast on, an inch above the elbow, and they felt  
that the cast was not a proper cast, so they took that off,  
took x-rays out of plaster, found the fracture of the elbow  
again and put him in a longer cast, and told him to come  
back in a month.

19

That's Page 2.

20

Q What do the x-rays for that date show?

21

A The x-rays show that -- about the same thing.

22

They show the fracture of the wrist and the  
fracture of the -- in the elbow. They don't mention  
the dislocation because the dislocation has been fixed.

25

Q Had been reduced; is that the term you used?

1 dhmch Mauer-direct 100

2 A Yes.

3 Q Was the patient then seen again on July 24th  
4 of 1970 at Brighton?

5 A Yes.

6 Q Does the note for that date indicate any  
7 prognosis as to the permanency of these injuries?

8 A Yes. What he says there, parts of the note,  
9 all the fractures are healing well. Expect wrist stiffness  
10 as the fracture involves the articulating surface. This  
11 means the meshing surface of the joint.

12 Q What is the medical significance, Doctor, of  
13 an injury which involves the articulating surfaces of a  
14 joint rather than, say, a long bone or something?

15 A Well, if a fracture goes into the joint, the nice  
16 smooth bearing surface of the joint has been disturbed,  
17 and when this heals it doesn't heal quite as smooth as it  
18 was before it was broken, and arthritis or stiffness  
19 could develop.

20 Q Doctor, what, in general terms, do the  
21 physical therapy reports show concerning the range of  
22 motion and the grip strength of the patient's right hand?

23 A In general, they show that the range of motion  
24 as he had physical therapy, the range of motion increased  
25 and the grip increased, but there is actually the grip

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2 strength at the end was not very different from what we  
3 find. There are times -- the last time in November of 1970,  
4 they say 45 on the right and 85 on the left.

5 Q This might be a different type of instrument;  
6 is that right?

7 A It may be. If we assume it's the same instrument,  
8 it's about the same as we find now.

9 Q Doctor, in a right-handed person, what would you  
10 normally expect to find as far as the comparative grip strength  
11 of the two hands are concerned?

12 A It really depends on how dominant the right hand  
13 is. But, certainly, the right hand, a tense squeeze in a  
14 normal right-handed person who is not too right-handed,  
15 the right hand is about 20 or 30 or 40 per cent stronger  
16 than the left.

17 Q Where a person that had a previous wrist fracture  
18 to his left hand, what would you expect?

19 A I certainly would expect the right hand then to  
20 be at least twice as strong.

21 Q And their bottom line finding there, if I was  
22 half as strong as that, is that the idea?

23 A About.

24 Q Doctor, what influences the functional result in  
25 a fracture such as this wrist fracture to Mr. Donovan?

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2 MR. HEALEY: I don't understand the question.

3 I object to the form.

4 THE COURT: I don't, either.

5 Q Doctor, did Mr. Donovan get a good result on --  
6 good functional result as far as his right wrist is concerned?

7 A No.

8 Q What is the reason for that? On what do you base  
9 that?10 A Well, the reason that he didn't get a good  
11 functional result is that the wrist healed with shortening  
12 of the main forearm bone, a relative lengthening of the  
13 other forearm bone, mechanically preventing motion, and  
14 the fact that the arm healed with the main forearm bone  
15 joint canted the wrong way so that the wrist cannot work in  
16 its proper angle.17 In other words, he had a malunion of the end of  
18 the radius and, in addition, some of the limitation of  
19 motion is probably -- or could be due to the fact that the  
20 fracture itself went into the joint and this was preordained  
21 by the type of fracture.22 The fact that it was a compound fracture had  
23 also -- also could have had something to do with the poor  
24 result that Mr. Donovan had in the healing of the fracture.

25 Q How does it compare to the result on the left

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2 wrist?

3 A The left wrist is very much better.

4 Q Does he have a normal elbow joint now?

5 A The motion of the elbow is reasonably normal.

6 He cannot bring the elbow all the way down like the left  
7 elbow. He lacks about 10 degrees of terminal bending of  
8 the elbow, but the elbow seems to be stable when I examined  
9 it last night. It didn't have any play in it. But the --  
10 I showed you in the x-rays where the fracture, that broken  
11 piece of bone still is not where it belongs and calcium has  
12 developed on either side of the elbow where the ligaments  
13 had been torn.

14 In other words, the elbow is not normal. It's  
15 got the scar tissue and calcium all around it, with an  
16 extra chip of bone in the joint itself.

17 Q Can that be a competent producing cause of pain  
18 when the arm is used?

19 A Yes, sir.

20 Q Doctor, are all of these findings that you have  
21 described with regard to Mr. Donovan's right wrist and his  
22 right elbow related to the accident of June 4th of 1970,  
23 in your opinion?

24 A Yes.

25 Q Based upon your experience and your training and

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2 your knowledge of this particular case, are you able to  
3 express an opinion with reasonable medical certitude as  
4 to the future course of Mr. Donovan's condition?

5 A He's not going to get any better. He might --

6 I am. He's not going to get any better. He  
7 might develop further arthritic changes in the wrist and  
8 the elbow, really depending on, one, how much he uses the  
9 wrist and the elbow; and two, depending on how much the  
10 joint actually was involved by the compound fracture and by  
11 the break in the joint.

12 Q Doctor, what effect, if any, will this injury  
13 have on Mr. Donovan's ability to perform the duties of a  
14 seaman?

15 A I think it would make it difficult. He's got  
16 quite a weak right arm.

17 Q You know that he has been working at least for  
18 several months a year as a seaman following this injury?

19 A I do.

20 Q How does that sit with your findings here?

21 A It was very, very hard for me to understand it,  
22 and my only explanation is that his buddies are doing a  
23 lot --

24 MR. HEALEY: Objection, your Honor.

25 THE COURT: Sustained.

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2 MR. MATTHEWS: Thank you, Doctor.

## 3 CROSS-EXAMINATION

4 BY MR. HEALEY:

5 Q Could you tell me yes or no to this one:

6 You find his work record somewhat inconsistent  
7 with your diagnosis and prognosis?

8 A Yes.

9 Q If, in truth, he is performing such work as an  
10 able-bodied seaman several months a year, and never mind  
11 supposing that somebody is helping him, if in truth he is  
12 doing that, does that have any effect on your diagnosis and  
13 prognosis as to the functionability of that arm?14 A It's not a question that I can understand even.  
15 Are you asking me hypothetically if he were to actually be  
16 performing it?

17 Q No.

18 MR. HEALEY: I will withdraw the question.

19 Q You have to understand it to answer it.

20 A Yes.

21 Q Assume as a state of facts that he is in fact  
22 performing the work of an able-bodied seaman a substantial  
23 period of time each year, which work involves handling  
24 heavy line, climbing up and down vertical ladders and doing  
25 other heavy work which involves the use of his hands and

1 dhmch Mauer-cross 106

2 wrists, if you assume that he is in fact doing that, would  
3 that change this diagnosis and prognosis you were giving  
4 as to the degree of function he has?

5 A No.

6 Q You say he has very little function?

7 A Yes, sir.

8 Q And you say that even if, in fact, he is functioning  
9 on board a ship; is that correct?

10 A Say that again?

11 Q I'm trying to figure out if he is in fact  
12 functioning. What you are telling us is he can't be "because  
13 I, Dr. Mauer, say so"; is that what you say?

14 A That's what I'm saying, yes.

15 Q All right.

16 Pursuing that, you were retained here to examine  
17 and evaluate on behalf of Mr. Donovan?

18 A That's right.

19 Q You didn't treat the man?

20 A No.

21 Q Your purpose was to come in and explain to a  
22 Court and jury what you consider to be the degree of  
23 disability he has suffered?

24 A That's right.

25 Q Is it fair to state, Doctor, you do that, well,

1 dhmcn Mauer-cross-redirect 118

2 Q Is that correct?

3 A It's mended, yes.

4 Q So I think you have indicated to us you're better  
5 off never having broken your wrist or torn your ligaments,  
6 but assuming it happened, at least the bones have mended  
7 in the wrist, as you have explained to us, with bone forming  
8 inside, you said gristle or callus, which then calcium  
9 forms in and you did get a solid mend?

10 A The bone is solid once again.

11 Q All right.

12 MR. HEALEY: I have nothing further.

13 REDIRECT EXAMINATION

14 BY MR. MATTHEWS:

15 Q Doctor, just a couple of questions with regard to  
16 this traumatic arthritis.

17 Mr. Healey asked you if it was possible that there  
18 would be no progression of traumatic arthritis, and I heard  
19 you say yes. Could you tell us, first of all, is there some  
20 evidence on the x-rays even today of narrowing of that joint?

21 MR. HEALEY: Which joint are you talking about?

22 MR. MATTHEWS: I'm talking about the wrist joint.

23 A There is a tiny bit of narrowing. If you look,  
24 these are the x-rays I took last night. If you look right  
25 here between the end of the bone right here, this happens

1 dhmch Mauer-redirect 119  
2 to be the navicular bone, and this part over here you can  
3 see a little tiny spur, a squaring off of the bone right  
4 here. You can see a little tiny squaring off of the bone  
5 right here. It should be round and smooth.

6 This is happening; this is happening. They're  
7 very, very early and minimal changes but it is happening.

8 Q Doctor, do the x-ray findings of post-traumatic  
9 arthritic changes always correlate with the symptoms  
10 of pain and so forth that accompany it?

11 MR. HEALEY: I object to the form of the question.

12 MR. MATTHEWS: I will rephrase it.

13 MR. HEALEY: There are no such x-ray findings at  
14 this point.

15 MR. MATTHEWS: I will rephrase it.

16 Q Doctor, is arthritis of this kind a competent  
17 producing cause of pain?

18 MR. HEALEY: I object. The doctor has said he found  
19 no evidence of arthritis.

20 He found some narrowing. So I object to the form  
21 of the question.

22 THE COURT: I suppose it's a hypothetical question.  
23 If you had. I think he answered it.

24 Q Doctor, following a fracture involving the articular  
25 surface of the wrist joint, is it probable -- and I'm

1 dhmch Mauer-redirect 120

2 speaking of Mr. Donovan now, that arthritis will not  
3 develop?

4 A It's highly improbable.

5 Q All right.

6 And will the development of the x-ray changes  
7 always proceed simultaneously with what other symptoms  
8 there may be?

9 A Not necessarily.

10 Q What would the other symptoms be?

11 A Pain, swelling, limitation of motion, pain on  
12 changes of weather; things like that. Pain before it rains.

13 MR. MATTHEWS: Thank you, Doctor.

14 MR. HEALEY: I have nothing further, Doctor.

15 THE COURT: Thank you. You may step down.

16 THE WITNESS: Thank you, sir.

17 (Witness excused.)

18 THE COURT: It will be a good time for a short  
19 recess, ladies and gentlemen. A five-minute recess.

20 (Recess.)

21

22

23

24

25

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2 Q How long all told, do you know? Have you got  
3 any records when you were laid up for these things?

4 A Well, I don't have records but I have a pretty  
5 good recollection.

6 For the calcaneal spur, approximately six weeks.

7 And for the --

8 Q Let me ask you, that's something in the heel?

9 A Yes.

10 Q Is that right?

11 A It's a build up of calcium in the heel, under  
12 the heel.

13 Q When did you have to get treatment for that?

14 A Oh, about, I'd say, five months ago. I got off  
15 the ship.

16 Q Five months ago?

17 A Yes.

18 Q All right.

19 Had that been bothering you for awhile?

20 A No, it just came on like overnight.

21 Q Okay.

22 Now, go on. What about the others that you  
23 recall? Your ulcers?

24 A The ulcers, I was laid up for about a month.

25 Q Had that been bothering you at all before you had

1 dhmcn Donovan-cross 131

2 be laid up?

3 A Not particularly.

4 Q Well, not particularly. Did you ever feel pain  
5 in your stomach or discomfort before you were laid up?

6 A I guess everybody feels pain in the stomach.  
7 But the ulcer hadn't been discovered before that.

8 Q Then you got this gash in your right thigh, I  
9 think you told us about.

10 A I was laid up for about a month with that.

11 Q Did you ever have any difficulties and go into the  
12 Brighton Hospital complaining of difficulties with your  
13 liver?

14 A With my liver?

15 Q Yes.

16 A No, sir.

17 Q Did you ever make such a complaint in Brighton?

18 A No.

19 Q Did you ever have any pain or difficulties that  
20 took you in to any doctor for treatment?

21 A No, sir.

22 Q Did you tell the doctors at Staten Island how  
23 your accident happened?

24 A How my accident happened?

25 Q Yes.

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Anderson-cross

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2                   Q     Are we agreed, sir, that these photographs -- I  
3     guess the ones that were -- well, this one here, that is  
4     No. 8, and this -- there should be a No. 7, I believe,  
5     that shows more or less the same thing. Yes, here it is.

6                   Are those accurate photographs of the port passage-  
7     way on the cabin deck on the Penn Sailor, sir?

8                   A     Yes. This is taken off the Penn Sailor.

9                   Q     Mr. Donovan, was he a good sailor?

10                  A     Yes.

11                  Q     When he came to you for treatment in the early  
12     morning hours of June 4th of 1973 --

13                  THE COURT: '70.

14                  Q     I'm sorry, '70 -- that's not the first time I've  
15     done that, either -- June 4, 1970 --

16                  THE COURT: Everyone does.

17                  Q     -- you saw paint on his trousers, didn't you?

18                  A     I believe I did, yes.

19                  Q     And you don't deny, do you, Mr. Anderson, that  
20     you may have said to him at that time that you told the  
21     boatswain to rope that off?

22                  A     No, I'm not denying that, no.

23                  THE COURT: Well, did you say it?

24                  THE WITNESS: I don't recall saying it.

25                  THE COURT: But you don't deny that you might

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2 FRANCIS X. DONOVAN

3 v.

70 Civ. 3572

4 PENN SHIPPING CO., INC., and  
5 PENN. TRANS. CO., INC.6 February 21, 1974  
7 10:00 a.m.

8 (Trial resumed.)

9 (In open court; jury present.)

10 THE COURT: We are now going to continue with  
11 the plaintiff's case, is that right?

12 MR. MATTHEWS: Yes, your Honor.

13 We have reached some agreement with regard to  
14 Exhibit 10 with regard to the wage rates. I am offering  
15 it in evidence.

16 MR. HEALEY: No objection.

17 (Plaintiff's Exhibit No. 10 is received in  
18 evidence.)19 THE COURT: SIU means Seafarers International  
20 Union, I take it?21 MR. MATTHEWS: Yes, your Honor. It's an abbreviation  
22 for that.

23 THE COURT: All right, received in evidence.

24 MR. MATTHEWS: Your Honor, there is a further  
25 stipulation between counsel that seamen when working aboard

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2      ship receive their meals and lodging free of charge; that  
3      Mr. Donovan received, pursuant to his union agreement,  
4      the sum of \$8 per day during the period of his treatment  
5      as an out-patient, that is, excluding the eight days when  
6      he was in the hospital, up until December 1st of 1970.

7

2 "Q What is the styloid bone of the ulna?

3 "A This is a small projection of bone from the distal  
4 end to the wrist of the ulna projecting toward the hand.

5 "Q What is its function?

6 "A It serves as a point of ligament attachment uniting  
7 the forearm bone or ulna to the wrist bones or carpal  
8 bones and hand.

9 "Q Is it part of the wrist joint?

10 "A Yes.

11 "Q Can a fracture such as you found be a painful  
12 injury?

13 "A Yes.

14 "Q What is osteoporosis?

15 "A Osteoporosis is a loss of callus in the bone so that  
16 the bone is not as dense and as strong as normal.

17 "Q What is meant by dorsal tilting of the distal  
18 fragment and joint surface?

19 "A The normal joint surface of the distal radius  
20 points downward; so that in this position, patient has  
21 normal motion. When the surface of the bone is tilted  
22 dorsally, it means that there has been reversal of the  
23 joint surface at the wrist.

24 "Q What is the significance of this to you as a  
25 doctor?

2            "A     The significance is that because it is in an  
3     abnormal position, there is restricted motion of the wrist;  
4     particularly in flexion toward the palm. Since it is in  
5     an abnormal position, there is an abnormal strain on the  
6     bones of the wrist which is conducive to traumatic arthritis  
7     in years to come.

8            "Q     Did you at my request review hospital records  
9     from the United States Public Health Service Hospital,  
10     Staten Island?

11           "A     Yes."

12           MR. MATTHEWS: I am going to skip that, your  
13     Honor, because I think Dr. Mauer has already testified  
14     as to those x-rays.

15           THE COURT: Yes, please do.

16           MR. MATTHEWS: "Q     What is meant by complete  
17     dislocation?"

18           "A     A complete dislocation means that there has been  
19     complete disruption of the joint with loss of opposition"--

20           THE COURT: "Apposition."

21           MR. MATTHEWS: "Apposition," your Honor.

22           -- "of one bone to the other."

23           "Q     Are the bones which make up the elbow joint held  
24     in place by anything?

25           "A     Yes, they are held together by ligaments.

2 "Q In order to effect a complete dislocation,  
3 what must happen to these ligaments?

4 "A It is necessary that these ligaments be torn or  
5 greatly stretched or both to have a complete dislocation.

6 "Q Explain what is meant by a severely comminuted  
7 and displaced colles fracture of the right wrist.

8 "A This is a common fracture incurred by falling  
9 on the hand and accompanied by shortening and impaction  
10 of the distal radius with dorsal tilting of the distal  
11 fragment of the radius; and accompanied by fracture of the  
12 styloid process of the ulna. Severely comminuted means  
13 that the bones are boken up into many fragments.

14 "Q When you saw the patient in August of 1970, did  
15 he tell you that he had been receiving treatment at  
16 Brighton Public Health Service Hospital?

17 "A No.

18 "Q How far is that from your office?

19 "A One-eighth to a quarter of a mile.

20 "Q Did you recommend any treatment to the patient?

21 "A Yes.

22 "Q What was the purpose of this treatment?

23 "A To increase his motion in the wrist and elbow  
24 and hand on the right side, and also increase his function  
25 of the above parts.

2 "Q Did you see the patient again after referring  
3 him to the Public Health Service for therapy?

4 "A Yes.

5 "Q When was that?

6 "A I saw him again December 10, 1970.

7 "Q Had he told you when he had completed his treatment  
8 at Brighton?

9 "A Yes.

10 "Q Had he in your opinion improved as much as he  
11 was going to?

12 "A I believe so.

13 "Q What were your findings on December 10, 1970?

14 "A Patient still had deformity of the right wrist" --

15 THE COURT: "Right elbow."

16 MR. MATTHEWS: I'm sorry, your Honor. I didn't  
17 do it intentionally.

18 -- "had deformity of the right elbow and wrist  
19 and had restricted extension of the elbow by 20 degrees,  
20 limited flexion by 15 degrees, limited pronation by 10  
21 degrees, had full supination; right wrist had deformity  
22 with shortening of the radius, prominence of the distal  
23 ulna, limited extension by 35 degrees, and flexion by  
24 35 degrees, no ulnar deviation and increased radial  
25 deviation. Fingers were limited in flexion, especially the

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2 fifth finger.

3 "Q What was your diagnosis?

4 "A Fracture old right elbow and wrist with  
5 contractures of right elbow, wrist and fingers.

6 "Q What do you mean by contractures?

7 "A The soft tissues are shortened and contracted and  
8 have scarred down so that there is limited excursion at  
9 the joints due to this tightening of the tissues.

10 "Q Are these conditions in your opinion permanent?

11 "A Yes.

12 "Q What in your opinion does the future hold for  
13 Mr. Donovan as far as his physical condition is concerned?14 "A This patient will have permanent restriction of  
15 motion of the right elbow, wrist and hand; and over a long  
16 period of time will gradually develop some traumatic  
17 arthritis of the right elbow, wrist, and hand.18 "Q I ask you to assume, Doctor, that Mr. Donovan's  
19 work on board ship involves, painting, handling lines,  
20 climbing ladders, and lifting things, as well as standing  
21 a watch. How is his physical condition as observed by  
22 you likely to affect this?23 "A He will be limited in his work and will have  
24 difficulty in using his right arm in work such as painting,  
25 handling lines, climbing ladders, since he will not have

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2 full use of the arm and it will tire easily, become  
3 painful, et cetera."

4 MR. HEALEY: Continuing, Line 13, these are  
5 questions that were submitted by my office to him:

6 "Q Who retained you to examine Francis X. Donovan?

7 "A Attorney George Dodd.

8 "Q Had you done any examinations of patients at  
9 the request of Attorney Dodd or other attorneys at any other  
10 time?

11 "A Yes, for both.

12 "Q Have you testified in court in connection with  
13 personal injury claims, and if so, estimate the number of  
14 occasions, whom you testified for, and whether you were an  
15 examining or treating physician?

16 "A I testify on the average of twice a week which  
17 would amount to about a hundred a year; and over the last  
18 twenty years there have been several hundred attorneys  
19 involved in these cases. I have no record as to their  
20 specific names, et cetera. I have been both examining and  
21 treating physician in these cases.

22 "Q How long did your examination of August 28, 1970  
23 take?

24 "A The examination alone took between twenty and  
25 thirty minutes.

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2      saying it's perfect. Don't try and credit me with being  
3      hard or irresponsible, but it's your duty here to  
4      see has it resolved, and I am just trying to point out to  
5      you that injury has made certain improvements, and the elbow,  
6      I think, substantially so.

7            We saw Mr. Donovan's wrist. I think despite  
8      what the doctors are saying and the like, I am sitting  
9      here and you are sitting here, and it was obvious to me  
10     the wrists are different. The wrist had healed off center.  
11     There is no quarrel; it would be foolish. He showed it  
12     to us. Of importance now, it's a fact. But there is good  
13     bony union. He doesn't have loose bones and it is  
14     not a fracture that didn't heal. At least he's got the solid  
15     healing.

16           So, I think as we look at Mr. Donovan now, we  
17     can see that he had a painful fracture of the wrist and  
18     the elbow -- dislocation of the elbow. He underwent six  
19     months of treatment, I guess it was, just short of six  
20     months. December 1st, the hospital said he was fit for  
21     duty, December 1, 1970. And over that six-month period,  
22     the elbow resolved and the wrist did come into a static  
23     position. It's solid, and that is the way it is now, and  
24     it does have this out-alignment. And the big question for  
25     you is, well, how is that affecting him now?

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2 figures.

3 In closing, I want to thank you very much.

4 I talked a little longer than I intended, I suppose.

5 Maybe it's partially because I am so miserable on the  
6 blackboard.7 Thank you again for the close attention you paid,  
8 and I just ask you to decide the case on the evidence.  
9 We ask no more.10 The Court will instruct you as to the law and  
11 we will be here awaiting your verdict.

12 Thank you very much.

13 THE COURT: We will take a short recess, five-  
14 minute recess, ladies and gentlemen, and then I will give  
15 you instructions on the law.

16 (In open court; jury not present.)

17 MR. MATTHEWS: Your Honor, I did not submit a  
18 request on circumstantial evidence, but --

19 THE COURT: I will give one.

20 MR. HEALEY: I have an application now, your  
21 Honor. I am going to move for a mistrial, to put this  
22 on the record. I repeat to your Honor, Exhibit 10 does  
23 not contain any specifications of all of this premium pay  
24 and overtime pay, these figures that Mr. Matthews spun  
25 off of Exhibit 10.

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2 THE COURT: I can't hear you.

3 MR. HEALEY: There is no basis in Exhibit 10 for  
4 any of those figures that Mr. Matthews has conjured out  
5 of it. There is a little figure, 485(p). This was shown  
6 to me by Mr. Matthews as indicating the overtime and  
7 wage rates. I took it on that representation. If I  
8 have been misled, your Honor has indicated, well, that is to  
9 my detriment, and I am saying --

10 THE COURT: Except, Mr. Healey, you agreed.

11 MR. HEALEY: No. I am saying to your Honor it  
12 doesn't say any of the things on Exhibit 10 that Mr. Matthews  
13 says it means.

14 THE COURT: What do you say (p) means?

15 MR. HEALEY: I haven't the slightest idea. He  
16 didn't tell me what it meant and he did not indicate this  
17 to me. He represented to me this showed the wage and  
18 overtime increases in the future. I accepted it as that.  
19 I said, "Write it out, fine."

20 Then he told me the tanker rate is higher.

21 I said, "Fine, write it out." I said, "Is that correct?  
22 I will accept your representation."

23 I had just gone through this a week ago in a  
24 case before Judge Metzner and I accepted these things and  
25 never heard a breath about all of this overtime stuff.

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2           That does not support what Mr. Matthews has  
3       now claimed it does. If I have been foolish enough to  
4       accept the representation and without knowing what (p)  
5       meant, that doesn't mean it gives him carte blanche to  
6       carry on as he did.

7           So I move, your Honor, I think it's very  
8       prejudicial to now indicate to this jury that a stipulation  
9       entered into between counsel has the basis for these hard  
10      and fast figures. I would add to that, I think that  
11      while it is discretionary, your Honor, using a blackboard,  
12      this business of saying that an eleven-year work  
13      expectancy is a hard and fast figure, is not proper and  
14      is misleading. The law is it's a guide.

15           THE COURT: I am going to charge them that it's  
16      a maximum figure.

17           MR. HEALEY: All right.

18           THE COURT: That counsel agreed upon.

19           MR. HEALEY: I would think, as your Honor said;  
20      normally it can be covered and should be covered in a  
21      charge, but I am indicating putting all of this together,  
22      I feel this is misleading and I feel that I have been  
23      misled and that the fact that I have been misled does not  
24      change Exhibit 10 into what Mr. Matthews says it is. I  
25      move for a mistrial.

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2 THE COURT: It's a serious motion and I am  
3 going to reserve decision on it. Let me put it that way.  
4 I will let it go to the jury, and then we will see.

5 MR. MATTHEWS: I would like to be heard on it,  
6 your Honor, if I could.

7 THE COURT: Yes.

8 MR. MATTHEWS: When I submitted this exhibit to  
9 Mr. Healey, and I find I don't have it in my bag now  
10 because I left part of the file back in the office, but  
11 I presented him with the two appropriate union contracts  
12 which covered this, and I represent to this Court as an  
13 officier of this Court, that what I stated to this jury  
14 with regard to premium pay is spelled out chapter and verse  
15 in those papers that I gave to Mr. Healey to examine before  
16 he agreed to it.

17 MR. HEALEY: No, you missed the point.

18 He had those papers there. But I think you are  
19 being unfair if you will keep in mind the course of  
20 conduct between us within the last week, when you asked  
21 for this in front of Judge Metzner, I gave it to you, and you  
22 indicated it was the same thing, and I said, "Fine."  
23 So you did have them there, Mr. Matthews. I have known  
24 you. I accepted what you were writing down there to be  
25 gospel --

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2 THE COURT: Let me ask you, Mr. Healey. Do  
3 you have any doubt that (p) means premium, actually?

4 MR. HEALEY: Do I have any doubt that (p) means  
5 premium? No, no, I still take his word. If he says  
6 it means premium, I believe it means premium.

7 However, all of this other evidence as to the  
8 effects of that figure is not, you know, anywhere before  
9 this Court.

10 THE COURT: That is argumentative, isn't it,  
11 Mr. Healey?

12 MR. HEALEY: No, Judge, it isn't argumentative  
13 to say that it means all of these things. It is not  
14 argumentative.

15 Well, sure it's argumentative upon no existing  
16 evidence, to have something that says (p), and I will  
17 concede, sure, it probably means premium. No indication  
18 it's anything different. It doesn't give a basis for the  
19 argument that has been made.

20 What I am suggesting, the fair thing to do,  
21 instead of -- there is a past course of conduct, as I  
22 indicated to you last week in front of Judge Metzner,  
23 the same thing, this never came up.

24 I have been misled and had Mr. Matthews shown me  
25 all this, I think it obviously would have opened up a

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2 lot more questioning of somebody about all of this stuff.  
3 We just had a case --

4 THE COURT: What do you want? Do you want  
5 another summation? Would that solve it?

6 MR. HEALEY: I don't want another summation.  
7 Strike it all out or else I think it should be a mistrial  
8 because how can you have another summation? I don't  
9 think Mr. Matthews wants to withdraw everything. If he  
10 does, fine. I would accept such a stipulation to withdraw  
11 those things as without evidence.

12 THE COURT: I think it went pretty far, but I  
13 just --

14 MR. HEALEY: These things always go pretty far.

15 THE COURT: Don't forget this, that I can always  
16 reduce the verdict if I feel it's excessive, Mr. Healey.

17 MR. HEALEY: I understand that, Judge, but I  
18 am just indicating to you my feeling on this.

19 THE COURT: All right, I will reserve on your  
20 motion, and treat it as a motion to dismiss, actually,  
21 for which some of the relief granted could be a new  
22 trial in the proper circumstances.

23 Let's see what the jury does. I don't like to  
24 retry it.

25 MR. MATTHEWS: Your Honor, not only are these

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2 agreed on but I would be very glad to present to the Court  
3 the specific evidence in the contract which Mr. Healey  
4 referred to.

5 MR. HEALEY: Don't say that. You know I didn't  
6 review it. You showed it to me.

7 THE COURT: Let's get on because I have to get  
8 the jury out. We have agreed that your special damages  
9 that you are claiming are \$6,000; is that it?

10 MR. MATTHEWS: I claim up to date, your Honor?

11 THE COURT: No, the loss of work, \$6,000.

12 MR. MATTHEWS: For the six months?

13 THE COURT: Yes.

14 MR. MATTHEWS: Yes, your Honor.

15 THE COURT: And no medical?

16 MR. MATTHEWS: No medical.

17 THE COURT: All right. The work expectancy is  
18 a maximum of eleven years?

19 MR. MATTHEWS: Yes, your Honor.

20 THE COURT: Well, we will see.

21 MR. MATTHEWS: May we take a few minutes now?

22 THE COURT: Take a few minutes, five minutes, and  
23 then I will get started.

24 (Recess.)

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2 (2:50 p.m.: In open court; jury present.)

3 THE COURT: Ladies and gentlemen, I have a  
4 note from the jury which reads as follows:

5 "We would like to have W-2 forms for 1971,  
6 1972 and 1973. Also the base pays from 1970, plus the  
7 premium rates and whatever other pertinent pay changes  
8 can be given to us."

9 Now, with respect to the first question, the W-2  
10 forms, counsel have agreed that for 1971 there is no  
11 evidence on the earnings. For 1972, the evidence is that  
12 the earnings were \$3,900.

13 For 1973, the evidence is that the earnings  
14 were \$5,500.

15 The second causes a little more difficulty with  
16 respect to the premium rates.

17 There was testimony by the plaintiff himself,  
18 Mr. Donovan, that the overtime work for able-bodied seamen  
19 is now \$3.44 an hour. I assume that that is probably  
20 based on roughly one and a half times the base pay. I  
21 am not sure of that, but I think it's probably so.

22 Then, as you know, on a ship they have to sail  
23 a ship, they can't get off and swim on Saturdays, Sundays  
24 and holidays, so instead of getting time and a half they  
25 get for that work -- I don't know whether it's double time

2 or some agreement with the union, but the only testimony  
3 in the record is that they now get \$5.16 an hour for  
4 Saturdays and Sundays and holidays.

5 Now we have had a bit of a controversy about  
6 Exhibit 10 which is this yellow sheet that I am going to  
7 give you, because the yellow sheet shows that from June 16,  
8 1972 to June 15, 1973, when the monthly base wage was  
9 \$555.83, that the hourly overtime was \$3.44, and then  
10 it says, plus \$4.80(p).

11 Similarly, for 1973 and 1974, as you will see  
12 on the sheet, there is another figure for (p).

13 This exhibit was introduced without objection.  
14 Mr. Healey now says that he did not understand, at least  
15 it wasn't explained to him, that (p) was going to be said  
16 to mean "premium," and if he had known that he wouldn't  
17 have allowed it in evidence because there is no evidence  
18 of what the premium rate is.

19 Now, to that extent, he is correct. There is  
20 no evidence of the premium rate except what I have just  
21 told you, that there is testimony by Mr. Donovan, as I said  
22 before, that at the present time it's \$5.16 an hour, so  
23 actually I must tell you that as far as my recollection  
24 goes, and yours may differ, there is no evidence of what  
25 the premium rate was actually between June '72 and June '73,

2 but that presumably for the year June 16, 1973 to June 15,  
3 1974, which the paper says has a premium rate of \$5.09,  
4 there is testimony by Mr. Donovan that it's \$5.16.  
5 I don't know what the fact is. I wasn't there.

6 . . . That is about the most I can do to clarify the  
7 situation for you.

8 The other pay changes that you asked, whether  
9 they are pertinent, I think that statement made by Mr.  
10 Matthews was that the union contract goes to some time  
11 in 1975, I guess June '75, and as he indicated to you,  
12 what happens after that is anybody's guess. It depends  
13 on conditions, on union negotiations and other things.  
14 So I am afraid you are just going to have to speculate  
15 on the basis of existing rates; and if you feel, and you  
16 are entitled to, that because of inflation and other things,  
17 they are likely to go up, you may take that into account  
18 if you choose to.

19 That is about the best I can do for you now  
20 with respect to what is in the evidence and what isn't.  
21 And, therefore, I am going to ask you, in effect, to  
22 disregard the premium rates which are shown on Exhibit 10.  
23 In other words, I am striking those out.

24 MR. MATTHEWS: I just want to point out, your  
25 Honor, that the premium rates are not in addition to the

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2 overtime, they are instead of the overtime.

3 THE COURT: We understand that. Everybody knows  
4 that.5 MR. MATTHEWS: There was a plus, I think, on  
6 there.7 THE COURT: There is a plus, don't disregard  
8 that, but I am telling you to disregard the whole right  
9 column when you look at Exhibit 10 because nobody really  
10 knows. It isn't in evidence.11 MR. MATTHEWS: Could we be heard at the side bar  
12 a moment, your Honor, on that?

13 THE COURT: Yes.

14 (At the side bar.)

15 MR. MATTHEWS: Your Honor, the contracts which  
16 I handed to Mr. Healey and which I would otherwise have  
17 offered into evidence, if he had not agreed to Exhibit 10,  
18 specifically set forth the premium pay.19 THE COURT: I'm sorry, you didn't put them in  
20 evidence. There is nothing I can do about it. There is  
21 no evidence to support that exhibit.22 MR. MATTHEWS: But the exhibit was put in by  
23 concession.24 THE COURT: All right, but I will explain the  
25 concession that he did it by error, so I will stand on that,

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2 I'm afraid.

3 MR. MATTHEWS: I would have to respectfully  
4 except.

5 THE COURT: You must except, sure you should.

6 MR. MATTHEWS: That is right.

7 (In open court; jury present.)

8 THE COURT: All right, ladies and gentlemen,  
9 you may resume your deliberations.

10 Give the jury Exhibit 10.

11 (Exhibit 10 handed to the jury.)

12 (At 2:55 p.m., the jury retired to resume  
13 deliberations.)

14 (Court Exhibit 1 marked.)

15 (Recess.)

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2 (4:05 p.m.: The jury returned to the courtroom.)

3 (In open court; jury present.)

4 THE CLERK: Members of the jury, please answer  
5 to your presence as your name is called.

6 (Jury roll called - all present.)

7 THE CLERK: Madam Forelady, have you agreed upon  
8 a verdict?

9 THE FORELADY: Yes.

10 THE CLERK: What is your answer to Question 1?

11 THE FORELADY: Yes.

12 THE CLERK: What is your answer to Question 2?

13 THE FORELADY: Yes.

14 THE CLERK: What is your answer to Question 3?

15 THE FORELADY: \$90,000.

16 THE COURT: 3 is what?

17 THE CLERK: \$90,000.

18 THE FORELADY: Yes.

19 THE CLERK: What is your answer to Question 4?

20 THE FORELADY: I don't think we filled that out.

21 THE COURT: No, 4 you don't have to answer.

22 THE FORELADY: We didn't have to.

23 THE CLERK: Question 5, what is your answer to  
24 Question 5?

25 THE FORELADY: No.

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2 THE CLERK: What is your answer to Question 6?

3 THE FORELADY: No answer.

4 THE CLERK: No change.

5 Question 7?

6 THE FORELADY: No, no answer.

7 THE CLERK: All right, be seated.

8 Members of the jury, listen to your verdict as  
9 it stands recorded. You say you find a verdict for the  
10 plaintiff in the amount of \$90,000, and so say you all.

11 THE FORELADY: We do.

12 THE COURT: All right. I don't like to comment  
13 on verdicts but I must say that's very high. I will see  
14 what we'll do about it later, but I appreciate your  
15 conscientiousness in watching the situation as closely as  
16 you have, and you are discharged with the thanks of the  
17 Court.

18 (The jury was excused and left the courtroom.)

19 THE COURT: Now, I reserved on motions but I think  
20 if you want to make a motion, you had better do it in a  
21 formal way, and I will give you a couple of weeks for  
22 motions.23 MR. HEALEY: I was going to suggest, your Honor,  
24 that I do want to press that motion, but I don't want to  
25 do it in some kind of haphazard fashion or one that wouldn't

10/1/70 - 6/15/72	500,55	3.44
6/16/72 - 6/15/73	555,88	3.44 + 4.85 (P)
6/16/73 - 6/15/74	583.67	3.44 + 5.09 (P)
6/16/74 - 6/15/75	612,85	3.44 + 5.34 (P)

Tunker rates slightly higher - about \$18 per month on base pay  
and 6¢ per hr. on overtime

**PLAINTIFF**

**EXHIBIT**  
**U. S. DIST. COURT**  
**S. D. OF N. Y.**

10

**UNION AGREEMENT REGARDING OVERTIME AND PREMIUM PAY  
EFFECTIVE JUNE 16, 1972**

**SECTION 21. OVERTIME RATES:**

Deck Department Rating	Premium Effective 6/16/72		Overtime Effective 6/16/72 6/16/74 to 6/16/75	
	6/16/72	6/16/73	6/16/74	6/16/75
Boatswain (> \$500 D.W.T. or over)	\$7.16	\$7.52	\$7.90	\$4.48
Boatswain (under \$500 D.W.T.)	6.53	6.86	7.20	4.48
A.B. Deck Maintenance	5.57	5.85	6.14	3.44
Able Seaman	4.91	5.16	5.42	3.44
Ordinary Seaman	3.90	4.10	4.31	2.73
O.S. Deck Maintenance	4.61	4.74	4.98	2.73
<b>Engine Department</b>				
Rating				
Chief Pumper	6.84	7.18	7.54	4.48
Second Pumper/Engine Maintenance	6.84	7.18	7.54	4.48
Engine Utility	5.62	5.90	6.20	4.48
Other	4.91	5.16	5.42	3.44
Other, Maintenance Utility	5.53	5.80	6.09	3.44
Fireman/Watertender	4.91	5.16	5.42	3.44
Wiper	4.51	4.74	4.98	2.73
Ship's Welder Maintenance	5.99	6.29	6.60	4.48
Q.M.E.D.	7.47	7.84	8.23	4.48
<b>Steward Department</b>				
Rating				
Chief Steward (> \$500 D.W.T. or over)	6.81	7.15	7.51	4.48
Chief Steward (under \$500 D.W.T.)	6.55	6.88	7.22	4.48
Steward Cook	6.91	7.26	7.63	4.48
Chief Cook	5.89	6.18	6.49	4.48
Cook and Baker	5.67	5.85	6.14	4.48
Third Cook	4.80	5.04	5.29	3.44
Assistant Cook	4.80	5.04	5.29	3.44
Messman	3.78	3.97	4.17	2.73
Utilityman	3.78	3.97	4.17	2.73

Except as otherwise provided, the Premium Rate set forth above shall be paid for all work performed on Saturday, Sunday, and Holidays; the Overtime Rate shall apply on Monday through Friday. When specific rates are provided in this Agreement for work done on Saturday, Sundays and Holidays, those rates shall not be less than the premium rate in effect.

All work performed in port between the hours of 5 p.m. and 8 a.m., Monday through Friday, shall be paid at the applicable rate.

**UNION AGREEMENT REGARDING OVERTIME AND PREMIUM PAY  
EFFECTIVE 1969**

**SECTION 21. OVERTIME RATE.** (a) The overtime rate of pay for members of the Unlicensed Personnel receiving a basic monthly wage of \$464.78 or below shall be \$2.73 per hour.

(b) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of \$464.79 or above, but not in excess of \$535.29, shall be \$3.44 per hour.

(c) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of \$535.30 or above shall be \$4.48 per hour.

The overtime rates set forth above shall be for all work performed on Saturdays, Sundays and Holidays, for any work in excess of eight (8) hours in any one day, and for all work performed in port between the hours of 5:00 P.M. and 8:00 A.M. Monday through Friday.

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SUMMARY OF EXHIBIT 13

FRANCIS X. DONOVAN'S DISCHARGES

			<u>Months</u>	<u>Days</u>
<b>1960:</b>	1/ 1 - 1/ 6	DFL MAR		6
	1/25 - 2/ 9	TRANSEASTERN		16
	2/19 - 5/13	ROYAL OAK	2	25
	6/11 - 7/18	CANTIGNY	1	8
	7/24 - 9/7	PETROCHEM	1	15
	9/15 - 10/ 3	CANTIGNY		19
	10/17 - 12/29	ROBIN TRENT	2	13
		TOTAL	9	2
<b>1961:</b>	1/26 - 1/30	DEL CAMPO		5
	2/ 9 - 2/25	SEATRAIN N. J.		17
	3/ 4 - 3/29	DANNY BOY		26
	4/6 - 8/7	CITIES SERVICE BALT.	4	2
	8/26 - 9/2	COUNCIL GROVE		8
	9/ 6 - 9/8	S/T ORION PLANET		3
	9/13 - 10/27	SS TOPA TOPA	1	15
	11/ 2 - 11/14	SS SEATRAIN N.J.		13
	12/15 - 12/31	SS MERMAID		17
		TOTAL	8	16
<b>1962:</b>	1/ 1 - 1/16	SS MERMAID		16
	1/25 - 2/16	SS SEATRAIN N. Y.		23
	7/19 - 11/22	SS HENRY	4	4
		TOTAL	5 1/2	
<b>1963:</b>	1/22 - 2/5	SS ROBIN HOOD		15
	2/17 - 4/14	MASSMAR		2
	4/25 - 6/19	SS HASTINGS	1	16
	7/24 - 9/24	SS WILD RANGER	2	
	10/ 1 - 10/23	SS JOHN B. WATERMAN		23
	11/ 6 - 12/ 6	SS TRUSTCO	1	
	12/17 - 12/23	ACHILLES		7
		TOTAL	8	
<b>1964:</b>	1/1 - 2/14	MOUNT WASHINGTON	1	15
	3/21 - 3/27	CITIES SERVICE TANKERS		7
	5/7 - 7/19	DEL ORO	2	12
	7/23 - 7/29	BIENVILLE		7
	8/9 - 8/23	ACHILLES		15
	9/13 - 9/23	ERNA ELIZABETH		11
	10/ 3 - 10/16	BIENVILLE		14
	10/30 - 12/31	SS HUDSON	2	2
		TOTAL	7	22

## Francis X Donovan's Discharges

Page 2

			<u>Months</u>	<u>Days</u>
1965:	1/ 1 - 3/24	HUDSON	2	24
	4/30 - 6/10	FLOMAR		11
	8/23 - 12/31	SS ROBIN TRENT	4	9
		TOTAL	<u>7</u>	<u>15</u>
1966:	1/ 1 - 2/20	ROBIN TRENT	1	20
	4/22 - 4/26	HERCULES VICTORY		5
	5/ 3 - 5/17	ROBIN GOODFELLOW		15
	6/ 4 - 9/19	CITIES SERVICE MIAMI	3	16
	11/ 4 - 12/ 4	STEEL ADMIRAL	1	1
	12/14 - 12/31	ELIZABETHPORT		18
		TOTAL	<u>7</u>	<u>15</u>
1967:	1/ 1 - 1/31	ELIZABETHPORT	1	
	3/15 - 3/10	CITIES SERVICE BALT.		2
	3/23 - 4/ 3	DE SOTO		12
	4/11 - 5/16	SS FRED MORRIS	1	6
	7/ 6 - 8/ 7	WESTERN COMET	1	2
	8/17 - 8/20	NEVA WEST		4
	8/22 - 11/19	GLOBE CARRIER	3	
	12/18 - 12/31	BRIGHAM VICTORY		14
		TOTAL	<u>7</u>	<u>10</u>
1968:	1/ 1 - 4/ 7	BRIGHAM VICTORY	3	7
	5/ 3 - 7/12	THE CABINS	2	10
	8/23 - 9/ 9	BETH TEX		18
	9/24 - 10/21	HOUSTON	1	
	11/13 - 12/31	SEATRAIN OHIO	1	19
		TOTAL	<u>8</u>	<u>22</u>
1969:	1/ 1 - 3/23	SEATRAIN OHIO	2	23
	4/14 - 6/ 2	AZALEA CITY	1	20
	6/ 7 - 7/26	BEAUREGARD	1	20
	8/23 - 10/ 8	ARIZPA	1	16
	10/30 - 12/25	WESTERN CLIPPER	1	26
			<u>9</u>	<u>15</u>
1970:	1/ 2 - 1/11	SS VANTAGE VENTURE		10
	4/ 1 - 6/ 4	SS PENN SAILOR	2	4
	12/12 - 12/31	SS PENN CHAMPION		20
		TOTAL	<u>3</u>	<u>4</u>
1971:	1/ 1 - 2/11	SS PENN CHAMPION	1	11
	2/24 - 3/ 3	ANDREW JACKSON		8
	4/10 - 5/15	CITIES SERVICE NORFOLK	1	6
	5/25 - 6/ 2	TRANSSUPERIOR		9
	7/ 3 - 8/31	EAGLE VOYAGER	1	29
		TOTAL	<u>5</u>	<u>3</u>

## Francis X Donovan's Discharges

Page 3

1972:		Months	Days
4/24 - 6/20	SS FAIRLAND	1	25
8/14 - 9/18	SS SEATRAIN DEL.	1	15
12/ 1 - 12/14	TRANSEASTERN		14
12/23 - 12/26	COMMANDER		4
12/28 - 12/31	LAFAYETTE		5
		<hr/> 4	<hr/> 3
1/ 1 - 1/ 1	LAFAYETTE		1
1/23 - 1/29	SS RAMBAM		7
2/ 9 - 2/15	DEL RIO		6
			<hr/> 14

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Paul C. Matthews, Attorney at Law, 11 Broadway, N. Y. 10004  
344-1936

April 30, 1974

The Honorable Murray I. Gurfein  
U. S. District Judge  
Chambers  
U. S. Courthouse  
Foley Square  
New York, N. Y. 10007

Re: Donovan v. Penn Shipping  
70 Civ. 3572 M/G

Honorable Sir:

It has now been two months since the jury rendered its verdict in favor of Mr. Donovan. To the best of my knowledge, judgment has not been entered. The interest alone on the award at the statutory rate of 6% is almost \$1,000, and continues to run at the rate of \$15 per day. Needless to say, this is a far lower rate of interest than can be gained by prudent investment at the present time.

In fairness to Mr. Donovan, would your Honor kindly order the clerk to enter judgment in this matter with interest to run from the date of the verdict.

Respectfully yours,

s/ Paul C. Matthews

PCM/gd

cc: Darby, Healey, Stonebridge & Whelan, Esqs.  
19 Rector St.  
New York, N. Y. 10006

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
FRANCIS X. DONOVAN, :  
Plaintiff, : FORMAL NOTICE OF MOTION  
- against - : 70 Civ. 3572  
PENN SHIPPING CO., INC., and :  
PENN TRANS CO., INC., :  
Defendants. :  
-----

S I R S:

PLEASE TAKE NOTICE the defendant having moved this Court subsequent to the rendition of the jury verdict and within ten days of said verdict to set aside such verdict on the grounds that it was contrary to the evidence against the weight of the evidence, excessive and having moved for a directed verdict and alternatively, for a new trial, pursuant to Rule 50 of the Federal Rules of Civil Procedure and having moved, during trial, for a mistrial and having renewed such motion at the close of all the evidence subsequent to the verdict, said motion having been timely made and the Court having directed that argument and decision thereon would be adjourned and reserved until receipt of the trial transcript from the Court Reporter, such trial transcript having now been received and filed with the Court.

Defendant hereby submits its brief in support of such motion and upon said brief and the trial transcript prays that this Court order that judgment for the defendant be entered in accordance with this motion notwithstanding the verdict or alternatively, that the verdict be set aside and the matter be set down for a new trial for among other things, the verdict was exclusive and for such other and

further relief as the Court deems just and proper.

Dated: New York, New York  
June 4, 1974

Yours, etc.

DARBY, HEALEY, STONEBRIDGE & WHELN  
Attorneys for Defendant

By: \_\_\_\_\_

A Member of the Firm  
19 Rector Street  
New York, New York 10006

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
FRANCIS X. DONOVAN, :  
Plaintiff, :  
- against - : 70 Civ. 3572  
PENN SHIPPING CO., INC., and :  
PENN TRANS CO., INC. :  
Defendants. :  
-----

BRIEF IN SUPPORT OF THE DEFENDANT'S  
MOTIONS MADE DURING AND AFTER TRIAL  
TO SET ASIDE THE JURY VERDICT AND  
ORDER A NEW TRIAL PURSUANT TO RULE 56  
ON THE GROUNDS THAT THE VERDICT IS  
EXCESSIVE AND THE COMMENTS OF PLAINTIFF'S  
COUNSEL IN CLOSING ARGUMENT WERE  
IMPROPER, PREJUDICED, AND INFLAMMATORY

The Court has a duty to review the verdict and  
if excessive must grant either a new trial or remit  
the excessive amount. Lanfranconi v. Tidewater Oil  
376 F<sub>2</sub> 91 (2nd Cir. 67)

*Break  
# 11  
erroneous  
charge re  
damaged*

The Appellate Courts have encouraged the use of  
the power noting; "In performing that judicial duty,  
hazardous as it may be, the judge ought not to be dis-  
couraged by the supposition that at the hands of the

Courts of Appeals remittiturs sometimes have a high mortality rate". Jenkins v. Aquatic Contractors  
446 F<sub>2</sub> 520 (5th Cir. 71)

There are of course no absolute tests for the Court to apply; rather the Courts own judicial experience and common sense are the proper guidelines.

These principles were succinctly stated in Schotka v. Amer. Export 311 F. Sup. 77 (SDNY 1969):

"When the sum agreed upon by the jury is so vastly at variance with what common sense and experience dictate to be a fair allowance in the particular circumstances of the case, courts have not hesitated to exercise their discretionary power to modify the verdict in the interest of fairness to all parties'  
Meehan v. Central R.R. of New Jersey 181 Supp 594, 608 (SDNY, 1960).

Moreover, having determined that this verdict is so grossly excessive as to be illegal, this Court has the duty to set it aside. As Judge Waterman pointed out in Dellaripa v. New York, New Haven and Hartford R.R. 257 F<sub>2</sub> 733, 735 (2nd Cir. 1958):

'(The trial Judge's) power to set aside a verdict as excessive implies that he has a duty to do so when he conscientiously believes that the jury has exceeded the bounds of propriety."

See also Caldecott v. Long Island Lighting Co. (2nd Cir., 1969) 417 F<sub>2</sub> 994; Botsford v. Ideal Trucking Co. (2nd Cir. 1969) 417 F<sub>2</sub> 681."

That this power of the Court to review and reduce verdicts is not a hesitant and sometime potential, but an actual affirmative obligation to be used boldly was stressed by the U.S. Supreme Court recently in Sea-Land Services, Inc. v. Gaudet 94 S. Ct. 806 (1974)

In Gaudet, the Supreme Court created a new area of damages as within the scope of their recently defined right of action for wrongful death in Moragne v. States Marine 398 U.S. 375. The surviving spouse was allowed to sue for "loss of society". That this was an area of little certainty and great speculation, fought with the danger of excessive verdicts because of jury sympathy was appreciated by the majority. (Mr. Justice Powell's dissent appreciated even more this threat of improper verdicts because of this item of "sentimental" damage.)

The remedy which the Supreme Court suggested to control this real threat of excessiveness was Court review and remittitur. At page 817 they specifically noted that:

"Appellate tribunals have amply demonstrated their ability to control excessive awards..."

POINT I

THE JURY VERDICT WAS EXCESSIVE AS A  
MATTER OF LAW

A) The Injury

The Court in its charge noted that the plaintiff's claim of damages was restricted to three elements.

- 1) Pain and suffexing.
- 2) Future lost earnings, not exceeding 11 years.
- 3) Special damages restricted to \$6,000.00.

(\$1,000.00 a month between June 4th and December 1, 1970)  
General damages for the pain and suffering involved in this type of injury cannot fairly and reasonably exceed \$10,000.00 to \$15,000.00.

The plaintiff sustained a colles fracture of the right wrist plus dislocation and chip fracture of the right elbow. (83)

The accident occurred on June 4, 1970 and Public Health declared the plaintiff fit for duty on December 1, 1970. Plaintiff then returned to his normal work. (43)

The Public Health finding of fit for duty means that a qualified physician who is familiar with the duties which an able bodied seaman must perform has made a medical determination that the man has been medically

.../...

cured so that he may return to his full and normal duties.

(108)

During the six month convalescent period the plaintiff was hospitalized for eight days and wore a cast on his right arm for about three weeks. (41)

Plaintiff testified that at the present time he still suffers from lack of strength in the right hand and aching after sustained heavy work. (44)

Plaintiff's medical expert testified that the elbow is completely healed, with no defect, leaving a fully functioning joint. (114)

The wrist is healed solid with joint completely united and the ligament mended. (117, 118)

There is however loss of motion due in most part to a deviation in the wrist resulting from some misalignment in the fracture healing. (94, 96)

There is some loss of strength in the hand (96, 97) and lack of full movement. However, there is no showing of arthritis. (113, 115)

Plaintiff appears to be working at his regular heavy manual job on a fairly steady basis since this accident. Indications are that despite the permanent residue left in the wrist because of the accident, he has a functional wrist. This is discussed further below, since the question of function is more properly related

to the mans economic performance.

As noted in the cases cited above, the Court has a duty to review and control the jury verdict and in assessing the fairness of the verdict the Court's "common sense and experience" are of paramount importance. In this regard, it is submitted that the Court's initial reaction at the time the verdict was rendered when all the evidence was fresh before the Court is of importance. In assessing the propriety of this award, the Court noted "I don't like to comment on verdicts but I must say that this is very high". (372) While each case must be reviewed on its own facts, the following cases do present a general norm against which this Court may weigh and discharge its own conscience.

Naglis v. Waterman S/S Corp. 390 F<sub>2</sub> 179 (3rd Cir. 68). Injury to arm and elbow, 25% permanent disability, inability to do any heavy work, \$35,200.00 characterized as "high" but sustained.

Sanchez v. Lubeck Linie A.G. 318 F. Sup. 821 (SDNY 1970) (10 days hospitalization, total disability of 10 months, lost earnings over these 10 months of \$10,500.00, after returned to work unable to do heavy work, arm permanently injured 17 1/2% disability - award \$30,000.00.)

Sylvestri v. Warner & Swasey 398 F<sub>2</sub> 598 (2nd Cir. 1968) Fractured wrist with permanent disability, degenerative arthritis and pain, with a permanent diminution of his earning capacity - award \$25,000.00.

Napolitano v. Compania Sud American 421 F<sub>2</sub> 382 (2nd Cir. 1970) 10% loss of use of arm, six to seven weeks disability, 10 year life expectancy award \$15,000.00.

See also Pratner v. N.Y. Scow 425 F<sub>2</sub> 1093 (2nd Cir.) and Campbell v. Tidewater 141 F. Sup. 431.

Dardar v. Louisiana 322 F. Sup. 1115

Cosentino v. Royal Netherlands 389 F<sub>2</sub> 726 (2nd Cir. 1968) 1968 AMC 392

Since the facts of this injury will not bear a greater general damage award than \$10,000.00 to \$15,000.00 and since the "special damages" were limited to \$6,000.00 with no medical expense there must be probative proof in this regard which would justify a jury award of \$70,000.00 to \$75,000.00 for future lost earnings to sustain this verdict. As demonstrated below, under the most favorable interpretations of this evidence, future lost earnings cannot exceed approximately \$30,000.00.

B) Future Lost Earnings

Although admitting that he returned to his regular employment in December of 1970 plaintiff claimed subsequent employment has declined as a result of functional difficulties with his right arm.

In his testimony the plaintiff did not give any indication as to how much time he was losing because of this accident. He admitted that he is doing heavy work which includes going aloft, handling heavy mooring lines, and climbing in and out of tanks. (54)

His chief complaint is that his arm ached after such work. (44) Several times he stated "I had to take time off". (55) He did not detail how much time he took off. He estimated however that he is losing about 35 to 40 hours of overtime per month. (47)

Donovan's own proof, therefore, is inadequate to support anything more than a claim for no more than 40 hours a month overtime. The overtime rate was \$3.44 an hour, or \$138.00 a month. He had averaged eight plus months a year so that over the 14 years of work expectancy (counting from the time of the accident) the total future losses, when discounted, would be in the area of \$14,000.00.

Aside from his testimony, Donovan placed certain figures in evidence. He submitted discharges for the years 1967 through 1973. This showed that he worked a

.../...

total of 25 1/2 months in the three years 1967 through 1969, an average of 8 1/2 months a year. The years 1971, 1972, and 1973 including the time lost because of three unrelated injuries, (ulcer, heel and thigh injuries) he averaged just under six months a year. Under this approach Donovan would show a falling off of about 2.8 months work subsequent to the accident.

In line with these work figures, he submitted limited records on earnings. In 1969 he earned \$9,300.00. He claimed to be earning \$940.00 a month on board defendant's vessels. These figures would show an average monthly income of somewhere between \$800.00 and \$1,000.00 a year. (This is fully consistent with the stipulation of plaintiff's counsel that for the six month disability period June through December 1970, his lost earnings were \$1,000.00.)

Following this figuring one would find that at most, Donovan would show a loss of \$2,800.00 a year. Up to the present time of trial he could show \$8,400.00 in non-discounted accumulated lost earnings and \$27,700.00 in discounted earnings for the future 11 years. Thus, the maximum award that a jury could make if they interpret everything in Donovan's favor (ignoring certain realities attested to by evidence concerning Donovan's life situation, e.g. unmarried, accumulated full pension time,

.../...

10.

still sailing in the second lowest rating, etc.) the total for future lost earnings award cannot exceed \$36,000.00.

These are the figures which are based upon factual proof. Argument based upon astronomical future overtime and premium pay is speculative, without foundation, improper and highly prejudicial. The defendant submits that the argument of plaintiff's counsel made in his closing remarks based upon abstract overtime figures and potential union rates (specifically objected to by defendant) was based upon no substantial evidence and was highly misleading and prejudicial.

The only testimony as to overtime came from Donovan himself. Generally speaking Donovan testified overtime is anything outside the eight hour working day. Certain special duties such as taking on stores would count as overtime even though performed during regular working hours. (46) A great deal of overtime on ships is compulsory such as cleaning tanks, undocking the ship, gas freeing the vessel. This work the men must do. (It is important to note that Donovan therefore has been performing this heavy work ever since he has returned to sea. (47)). Working on Saturdays, Sundays and holidays is also overtime.

If the men work on Saturday, Sunday and holidays, they can receive premium overtime. Donovan never

.../...

11.

explained whether premium pay would only be while the vessel was in port and the men would not go ashore, or whether it also included the Saturdays, Sundays and holidays when the ship might be steaming at sea. (48)

Donovan went on to explain on cross-examination that it is not every Saturday and Sunday that a man draws premium overtime. It would only be if the ship was pumping and the men were on board assisting in this job.

(60, 61) Donovan admitted that the work must actually <sup>c/f</sup> 62 be performed on a Saturday or Sunday to earn premium overtime. (63)

The only fair inference that can be drawn from Donovan's testimony is that the great bulk of overtime is paid for at the rate of \$3.44 an hour. This figure is constant. If a man earns premium overtime by actually working on a weekend, he can draw \$5.34 an hour. But Donovan's testimony made clear that the union agreement did not entitle each man to 113 days of premium overtime (the number of Saturdays, Sundays and holidays in a work year). The number of premium overtime days that a man might accrue would be entirely fortuitous and Donovan's testimony provided no basis for inferring that he lost any such time, or would.

.../...

Plaintiff's counsel introduced into evidence as Exhibit 10, figures which he represented showed the base wage and overtime. This limited representation was accepted by defense counsel. A copy of Exhibit 10 is attached to this memo and it shows that it contains not a single bit of evidence to explain Donovan's testimony about premium overtime or how much work Donovan actually did. (Plaintiff's counsel had used the same figures in a prior case pursuant to a similar agreement and had never claimed that they bore any reference to premium overtime. Because of this prior course of conduct defendant submits that the surprising remarks of plaintiff's counsel in his summation constitutes a misrepresentation of Exhibit 10.)

Turning now to the use plaintiff's counsel tried to make of the limited proof concerning premium pay the Court is referred to pages 307 through 316. It is suggested that a reading of this argument shows that the discussion concerning figures is so confusing that it cannot be followed but the net result is to create an aura of lost earnings completely contrary to those which the documented earnings records show. Specifically, at page 310 plaintiff's counsel launched into his argument concerning premium time. He alleged an increase of \$125.00 per month in premium time and then continued to spin this

....

figure out along with other suppositions and reached the astronomical figure for lost earnings. As the record clearly demonstrates, there was obviously no proof to support a premium pay argument. The jury's verdict was so at odds with common sense and the evidence that this misrepresentation was obviously effective.

Finally, there was insufficient evidence for the jury to infer that Donovan's work record would become worse because of this injury. The condition, according to his own medical expert was stable and Doctor Mauer attempted to create the impression that there was a subsequent loss of function. However, the doctor admitted that function could only be properly tested by how well the man is actively using the arm and not by abstract theory. (116) The proof was that the arm was functioning and there was nothing to infer any dramatic change in the future.

These unfettered flights of fancy, from whose heights the lawyers seer can survey his clients injury - devastated economic future in a glance have not escaped the Courts comment. They have been held improper, and so prejudicial as to require, not simple reduction, but an entire new trial.

.../...

In Hoffman v. Sterling Drug Inc. 485 F<sub>2</sub> 132

(3rd Cir. 1973) the Court held that "evidence" from an economist that plaintiff would receive annual 6% salary increases throughout his work expectancy was speculative and improper. (In the present case, plaintiff's proof never even rose to the level of Hoffman.)

"Although the determination of such damages often involves a host of uncertain contingencies, the verdict must still have its basis in evidence, not conjecture. ... Two architects, Kimmons and Martin, testified as to the salary which an architectural draftsman of plaintiff's experience might receive. ... Based on this testimony, Dr. Schoenwald, an economist, presented his mathematical calculations of the present value of plaintiff's projected loss of future earnings. ..."

As stated earlier, the jury returned a verdict of \$437,000. Defendants maintain that this award was improperly influenced by Schoenwald's figures representing plaintiff's 'fictional career.' They argue that there was no evidence to support Schoenwald's assumption that the plaintiff's salary would increase at 6% annually, ...

Although offered in terms of continuing increases in wage rates, as opposed to a continuing decline in the value of the dollar, the testimony in question reflects a continuing inflationary spiral. We note that inflationary considerations have been almost universally rejected as a factor in computing future losses. ...

Hoffman's counsel has isolated a five year period in the late 1960's, one of

....

the more inflationary periods in our history, and used it as the basis for a projection of over 26 years without introducing any evidence to support such a projection. ...

In short, the projected 6% per year earnings increase in the present case is speculation, requiring a new trial on the question of damages. "

Hoffman v. Sterling, supra p. 143 - 144.

The New York State Courts have addressed themselves to the problem.

In Zaninovich v. American Airlines, Inc.

26 A.D.<sub>2</sub> 155, 271 NYS<sub>2</sub> 866, Judge Breitel writing for the Court, addressed the matter of future loss and speculative proof.

"There is no doubt that the father's earning potentialities for the future are to be considered (citations omitted) Nevertheless, those potentialities must be discounted not only financially in determining present value of future funds but practically in recognizing that potentialities are contingent and subject to unforeseen and unforeseeable vicissitudes...."

Further pertinent comment was made in

Bartkowiak v. St. Adalbert's Roman Cath. Ch. Soc.,

40 A.D.<sub>2</sub> 306, 340 NYS<sub>2</sub> 137

"Several evidentiary rulings during the trial deserve comment. Plaintiff's counsel proposed to submit an economist's testimony regarding decedent's projected earnings based on the 26.2 years estimated life expectancy of decedent's mother. The Trial Court properly excluded this proof. The jury may consider

.../...

the probable earnings of decedent during his minority over and above his support, clothing and education; the probability of him having sufficient means to support his parents if they are in need; the voluntary assistance which decedent might have given non-dependent next-of-kin while living, and their prospect of inheriting from him at his death (67 N.Y.Jur., Wrongful Death, § 185, and 1 PJI 2:320). Expert testimony is admissible as to a decedent's future prospects when they are not matters within the general knowledge of the jurors (Zaninovich v. American Airlines, 26 A.D. 2d 155, 158-159, 271 N.Y.S.2d 866, 870, 871). The reason for the admission of such expert testimony, of course, is necessity (Richardson, On Evidence (9th ed.) § 387). Nevertheless, a bare statement of projected earnings expressed in a dollar amount derived from a mathematical formula based on 26.2 years life expectancy of decedent's mother would be speculative and prejudicial while its probative value on the amount which decedent might actually have contributed is remote and slight (cf. Paley v. Brust, 21 A.D.2d 758, 250 N.Y.S.2d 356).

Bartkowiak v. St. Adalbert's Roman Cath. Ch. Soc., supra. p. 143

Respectfully submitted,

DARBY, HEALEY, STONEBRIDGE & WHELAN  
Attorneys for Defendant  
19 Rector Street  
New York, New York 10006

THOMAS H. HEALEY  
(Of Counsel)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

FRANCIS X. DONOVAN,

Plaintiff,

JF 41069

-against-

70 Civ. 3572 MIG

PENN SHIPPING CO., INC.  
and PENN TRANSPORTATION CO., INC.,

Defendants.

- - - - - X

APPEARANCES

PAUL C. MATTHEWS  
New York, N.Y.  
Attorney for Plaintiff

DARBY, HEALEY, STONEBRIDGE & WHELAN  
New York, N.Y.  
Attorneys for Defendants  
THOMAS H. HEALEY, of Counsel

APR 6 1971  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

GURFEIN, D.J.:

M E M O R A N D U M

The defendants renew motions made at the end of  
a two day trial to set aside the jury verdict of \$90,000  
in favor of the plaintiff seaman, and to enter judgment for

the defendant and, alternatively, to order a new trial on  
the ground that the verdict was excessive.

The motions for judgment in accordance with  
defendant's motion for a directed verdict and for a  
mistrial are denied. Fed. R. Civ. P. 50(b).

For the reasons stated, the motion for a new trial  
on damages alone, see Yates v. Dann, 11 F.R.D. 386, 392  
(D. Del. 1951), is granted on the ground that the jury verdict  
is excessive unless the plaintiff consents to a remittitur  
of the excess over \$65,000.

Francis X. Donovan is a seaman, aged 54 years  
at trial in February, 1974. He had a maximum working  
expectancy of 11 years from the time he returned to work on  
December 1, 1970, or 14 years from the time of the accident.  
He had a life expectancy of 20 years. The plaintiff suffered  
an injury on board the SS PENN SAILOR on June 6, 1970. He  
was out of work for about six months.

The plaintiff sustained a colles fracture of the  
right wrist plus a dislocation and chip fracture of the  
<sup>2/</sup>  
right elbow. The residual effects were, in the plaintiff's

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1/ Tr. 374-75.

2/ Tr. 83.

own words, described as follows: "Well, I had problems in the sense that I didn't have a strong grip and if I did any heavy work my arm would ache me for several hours afterwards."<sup>3/</sup> On December 1, 1970 the Brighton Public Health Service had declared the plaintiff "fit for duty"<sup>4/</sup> and he then returned to his normal work.

Plaintiff's medical expert testified that the elbow is completely healed, leaving a fully functioning joint.<sup>5/</sup> There is a loss of motion in the wrist due in most part to a deviation in the wrist resulting from a misalignment in the fracture healing.<sup>6/</sup> There is some loss of strength in the hand and lack of full movement.<sup>7/</sup>

The plaintiff testified that he was losing 35 to 40 hours of overtime per week because of his condition.<sup>8/</sup> The overtime rate was \$3.44 per hour or \$137.60 per month maximum loss of overtime on the basis

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3/ Tr. 44.

4/ A Public Health finding of "fit for duty" means that a qualified physician who is familiar with the duties which an able bodied seaman must perform, has made a medical determination that the man has been medically cured so that he may return to his full and normal duties. Tr. 108.

5/ Tr. 114.

6/ Tr. 94, 96.

7/ Tr. 96, 97.

8/ Tr. 47.

of all 40 hours lost. There is inadequate proof of the applicable rate of premium pay for Saturdays, Sundays and holidays, but assuming that for 1/3 of the week the pay was \$5.34 per hour as premium pay instead of \$3.44 per hour, the jury could have added \$1.90 per hour for 1/3 of 40 hours or 13 hours. That would add \$24.70 to our overtime figure of \$137.60, making it \$162.30 for maximum overtime lost per working month.

Though the proof is far from convincing, let us assume that before the accident the plaintiff worked an average of 8 months per year and after the accident could work only 5 months per year. On that extreme assumption, he would have lost three months per year in the three years between his return to work and the trial and three months thereafter while his work expectancy continued.

Wages lost from December 1, 1970 to February, 1974

From December 1, 1970 to June 15, 1972 his base pay was \$500.55 per month and his overtime pay was at the rate of \$3.44 per hour. In the 19 months involved, it is assumed he lost 4 1/2 months (3 months per year) and 40 hours per month overtime. He would have lost as a maximum

\$500.55 x 4.5 months or approximately \$2,252.00 plus 180 hours of overtime at \$3.44 per hour, or \$619.20 for a total of \$2,871.20. From June 16, 1972 to June 15, 1973, the base pay was \$555.88. On the same basis of computation the result is \$2,080.44 in lost wages. From June 16, 1973 to February 1974 -- 8 months, the base pay was \$583.67. Assuming plaintiff lost the whole 3 months in that time, he would have lost \$1,751.01 in base pay, and for 2/3 of the 40 hour lost overtime at \$3.44 approximately another \$90.00, plus premium overtime for 13 hours at \$5.09 or \$66.17 additional, totalling about \$1,907.00. The grand total, from return to work to time of trial, would be \$6,860.00. Defendant concedes, however, that a possible maximum for the period would be an undiscounted loss of \$8,400.00 and I shall raise my figure accordingly.

With respect to future losses in pay: the plaintiff would lose a maximum of three months a year base pay for a period of 11 years. Taking current base pay as \$612.85 per month, he would lose 33 times that sum undiscounted, or \$20,224.05. If we assume he lost

overtime for the whole 8 months he would have worked on the basis of 40 hours per month or 320 hours per year. At basic overtime of \$3.44 per hour the amount of loss per annum would be an additional \$1,100.80. If we add to this \$1.90 per hour premium for 13 hours a month or for 104 hours a year, we get an additional \$197.60 per annum or a total per annum of an additional \$1,298.40. Multiplying this by 11, we get an additional gross figure of \$14,282.40. Adding this to the \$20,224.00 we have already derived from the base pay loss we get approximately \$34,506.00 as a maximum loss of wages over the entire period, on the assumption that the plaintiff would actually have worked all the overtime periods.

To recapitulate:

- (a) \$6,000 is accepted as loss of wages from June 1970 to December 1, 1970, return to work.
- (b) \$8,400 is the conceded figure by the defendant for return to work to trial.
- (c) \$34,506 is the maximum future damage from loss of future wages.

If \$34,506 is discounted under the McWeeney formula which both parties accept, the discounted value is approximately \$30,710.34.

The total is approximately \$45,110.

The jury awarded \$90,000 of which I must, hence, attribute about \$45,000 to pain and suffering. This I feel is excessive. We are dealing with a fractured wrist and elbow, and even on the plaintiff's own version the pain is not constant.

Since I think it is right to allow the maximum possible in view of the plaintiff's right to trial by jury, I shall set the maximum for pain and suffering at \$22,000. Assuming pain and suffering to be constant, the award for pain and suffering for the past four years is not discounted. For future pain and suffering 3/4 of \$22,000 or \$16,500 is discounted to \$13,860 for pain and suffering for the remaining sixteen years of his life expectancy. This brings the total award to roughly \$64,470 and permits extreme speculation by the jury that the pain would be constant day in and day out at the rate of \$3 per day -- a figure that has been recognized as reasonable in a case like this. See Napolitano v. Compania Sud Americana De Vapores, 421 F.2d 382, 384 (2 Cir. 1970).

Since I think the jury wished to award the maximum allowable, I shall set the remittitur at the excess above \$65,000. On failure of acceptance of the remittitur by the plaintiff, a new

A-106

trial will be ordered on damages alone. Yodice v. Koninklijke Nederlandsche Stoom Maat v. Universal Terminal and Stevedoring Corp., 443 F.2d 76 (2 Cir. 1971); 6A Moore's Federal Practice, 59.05[3].

August 6, 1974

William J. Dwyer  
U.S.D.J.

A-107

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
FRANCIS X. DONOVAN,

Plaintiff,

- against -

70 Civ. 3572 MIG

PENN SHIPPING CO., INC. and  
PENN TRANS. CO., INC.,

Defendants.

----- X  
S I R S :

PLEASE TAKE NOTICE, that the undersigned will appear before the Court before the Honorable Murray I. Gurfein, U. S. District Judge, in Chambers Room 2904, U.S. Courthouse, Foley Square, New York City, on the 13th day of September, 1974 or as soon thereafter as counsel may be heard, for reargument of defendant's motion to set aside the verdict and grant a new trial on the issue of damages in the above case.

Dated: New York, N. Y.  
August 16, 1974

Yours, etc.,

PAUL C. MATTHEWS  
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344-1936

TO: DARBY, HEALEY, STONEBRIDGE & WHELAN, ESQS.  
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19 Rector St.  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
FRANCIS X. DONOVAN,

Plaintiff,

- against -

70 Civ. 3572 MIG

PENN SHIPPING CO., INC. and  
PENN TRANS. CO., INC.,

Defendants.

----- X

MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION  
FOR RE-ARGUMENT

The Court, after consideration of briefs submitted by the parties, has held that the maximum allowable verdict in this case is \$65,000. In so doing, the Court has overlooked certain evidence with regard to vacation pay and overtime which necessarily has caused an erroneous result. In addition, the Court may have overlooked the fact that the plaintiff is entitled to an award for his permanent injury and that the amounts which are permissible for pain and suffering should be reevaluated in terms of the case law and inflation which has occurred since the particular cases have been decided.

1. Vacation Pay.

The evidence is undisputed that one of the emoluments accrued by an able-bodied seaman who is a member of the Seafarers International Union is vacation pay at the

rate of \$100 per month. (T51) The evidence is this regard is undisputed, but the Court has not taken this into consideration in determining the maximum allowable damages.

2. Overtime.

The Court has assumed in computing its figures that plaintiff worked 40 hours overtime per month. There was evidently confusion. The 40-hour-per-month figure represents the number of hours overtime which plaintiff lost and will lose during those months when he was and is working. For the months when he was prevented from working and which he will be prevented from working in the future, the average monthly overtime figure is approximately 140 hours, of which 75 hours represents premium time (work performed on Saturdays and Sundays,) and the balance of 65 hours represents work performed or to be performed on week days.

Plaintiff testified without contradiction that his average monthly earnings were \$950 per month as of the time of his accident on June 4, 1970 (T44). At this time his base pay was \$475.29 per month (T45, defendant's Exhibit A). The balance of \$475 represented overtime at the rate of \$3.44 per hour. During the period from April 1, 1970 through June 4, 1970 when plaintiff was serving on the SS PENN SAILOR, there were 9 Saturdays, 9 Sundays, and one holiday, accounting for 152 hours of Saturday, Sunday and holiday work, an average per month of approximately 70 hours. (This is slightly less than the annual average because there was only one holiday

during this period.) During this period there was an average of 68 to 70 hours of overtime which were worked on week days. For the purpose of long-range computation, a reasonable figure supported by the evidence would be 65 hours of overtime on week days and 75 on weekends and holidays.<sup>1</sup>

This difference will substantially effect the loss of earnings figures both with regard to future loss of earnings and with regard to loss of earnings up until the time of the trial. The Court computed the loss of earnings up until June 15, 1972 at \$2252 base pay plus 180 hours of overtime for a total of \$2871.20. The correct figure for overtime during this period should have been 630 hours ( $4 \frac{1}{2} \times \$140^2 = \$2167.00$ ) overtime, making a total loss of earnings during this period of \$4419.

1. There are 52 Saturdays, 52 Sundays and 9 holidays each year (Union Agreement, Sec. 20), a total of 113 days or 904 hours. This averages to ~~75~~  $1 \frac{1}{2}$  hours per month of premium pay.

The Union Agreement of June 16, 1972 provided: (Sec. 21) "Except as otherwise provided, the Premium Rate set forth above shall be paid for all work performed on Saturday, Sunday and holidays; the Overtime Rate shall apply on Monday through Friday...."

2. There was no premium pay during the time when plaintiff was not working, up to June 15, 1972.

During the period June 16, 1972 through June 15, 1973 the monthly figures are as follows:

Base Pay:	\$555.88
Week Day Overtime: 65 hours @ \$3.44	223.60
Premium Pay: 75 hours @ \$4.85	<u>363.75</u>
Total	\$1143.23 per mo.

and \$3430 for three months.

For the period from June 16, 1973 up until the time of the trial, comparable figures are:

Base Pay:	\$583.67
Week Day Overtime:	223.60
Premium Pay: 75 hours @ \$5.09	<u>381.75</u>
Total	\$1189.00 per mo.

(An annual rate of \$3567.00)

Likewise affected, of course, are the future loss of earnings. The Court allowed a total loss of future earnings of \$30,710,\* comprised of \$18,000\* base pay and \$12,710\* overtime computed at the rate of \$1293.40 per year. The overtime on the basis of the proven figures of 140 hours per month (75 hours of prime pay and 65 hours of overtime) comes to \$624 per month or \$1872 per year. Therefore, the discounted value of the future overtime according to the proof was \$18,327.\* Furthermore, the Court made no award for the

\*Discounted.

**Footnote:** The Court has assumed that the plaintiff averaged 8 months per year. The discharges in evidence showed an average of 8 2/3 months per year.

40 hours of overtime which plaintiff would lose during each of the five months when he would be working. This would come to an additional \$688 per year, or a discounted future loss of \$6811.\* As a convenient recapitulation, the following table will show the loss of earnings, the amount established by the proof, and the amount allowed by the Court. In certain instances where the defendant has claimed a certain figure as established by the proof, that figure has been included as well. The figure for future loss of earnings conceded by the defendant was \$36,000, whereas the Court only allowed \$30,710. As will be seen from the table, the actual loss of earnings established by the proof (using the Court's formula) from December 1, 1970 until the date of the trial, is \$13,141.60. Since the Court awarded \$8400, there is a discrepancy of \$4741.60 in the loss up until the time of the trial. With regard to the future losses, the error in computing the overtime for the three months per year when plaintiff would not be working, has caused an error of \$5617.\* The loss of overtime while working (omitted from the Court's calculations) comes to \$6811.\* The loss of three months' vacation pay per year comes to \$2937.\* The total error on future losses is \$15,365,\* and the total error on wage losses past and future comes to \$20,106.60.

\*Discounted.

Damages

## 1. Loss of Earnings until 12/1/70

<u>Plaintiff claims</u>	<u>Defendant Claims</u>	<u>Court Allows</u>
\$6,000	\$6,000	\$6,000

## 2. Loss of Earnings 12/1/70 to Trial

<u>Plaintiff Claims</u>	<u>Defendant Claims</u>	<u>Court Allows</u>
\$14,000	\$8,400	\$8,400

## (a) Base Pay While not Working

12/ 1/70 - 6/15/72	\$2,252.00
6/16/72 - 6/15/73	1,667.64
6/16/73 - Trial	1,751.01
	<u>\$5,670.65</u>

## (b) Overtime While not Working

Court allows 40 hours per month.

Proof shows 140 hours per month.

	<u>Should be</u>	<u>Court Allows</u>
12/ 1/70 - 6/15/72	\$2,167	\$ 619.20
6/16/72 - 6/15/73	1,762	412.80
6/16/73 - Trial	1,816	156.00
	<u>\$5,745</u>	<u>\$1,188.00</u>
	- 1,180	
Difference	<u>\$4,564</u>	

## (c) Loss of Overtime While Working 12/1/70 - Trial

$13 \frac{1}{2} \times 40 \times \$3.44 = \$1857.60$   
 (Court made no award for this item.)

(d) Loss of Vacation Pay for 10 1/2 months While not Working 12/1/70 - Trial \$1050.00  
 (Court made no award for this item.)

\$ 5,670.00
4,564.00
1,857.60
1,050.00
<u>\$13, 141.60</u>
- 8, 400.00
<u>\$ 4, 741.60</u>

### 3. Future Loss of Earnings (Discounted)

<u>Plaintiff's Claim</u>	<u>Defendant's Claim</u>	<u>Court Allows</u>
(On Basis of 3 mos loss per yr)		
\$54,000	\$36,000 (brief) (p.10)	\$30,710.

(a) Base Pay { 20,224.  
                        (Discounted) 18,000.

(b) Overtime While not Working

Court allows 40 hours per month = \$1298.40 per yr.

Proof shows 140 hours per month = \$14,282.40

65 @ \$3.44 = \$223.60 (Discounted) 12,710.00  
 75 @ \$5.34 = 400.50  
 \$624.00 x 3 = \$1872 per yr.

### Should be

\$20,592 for 11 yrs.

18,327 Discounted

$$- \frac{12,710}{5,617} \text{ Difference}$$

(c) Loss of Overtime While Working

$$40 \times \$3.44 \times 5 = \$688 \text{ per yr.}$$

\$7,566

(Discounted) \$6,811 (Court makes no award for this item.)

(d) Loss of Vacation Pay

\$100 per mo. • \$300 per yr.

\$3300.

(Discounted) \$2937. (Court made no award  
for this item.)

**\$5617.00**

6811.00

\$ 2937.00

Difference on Future Losses \$ 15,365.00

Total Difference \$ 20,106.60

In addition to the foregoing, some comments should be made on the figures allowed for pain and suffering:

1. Pain and suffering to date:

The Court only allowed \$5500 for four years of pain and suffering including the agony of the original injury and the procedures for the treatment thereof. Since no amount was allowed for permanent injury and deformity, this must also be included in the element of pain and suffering. Certainly the amount allowed by the Court is extremely conservative.

2. Future Pain and suffering:

The Court allowed 16 years of future pain and suffering at \$3 per day as discounted under the McWeeney formula, and commented that this figure was recognized as reasonable in the Napolitano case. That case cited by both attorneys in their respective briefs was a 1970 Court of Appeals case involving a contusion and sprain of the left shoulder causing the plaintiff to be out of work six or seven weeks resulting in intermittent pain and discomfort on weather changes, and aching in the morning, to a longshoreman with a 10-year life expectancy. The loss of use of the arm as stated by defendant was only 10 per cent, but the award of \$3 per day for pain and discomfort and loss of mobility was approved. Although no percentages were expressed by Dr. Mauer, it is clear that Mr. Donovan, with the two injuries to his elbow and wrist, has sustained at least a 50% loss of use of his arm, and that his daily award for pain and suffering and

loss of motion according to the Napolitano case could properly be about \$10 per day. Since he has a life expectancy of 20 years, this would amount to \$73,000 or \$58,400 as discounted under the McWeeney Formula.

Quite apart from the sharp differences between the injuries of Donovan and Napolitano, two things should be observed:

1. Inflation has eroded the dollar at least 25% in the four years since the Napolitano decision.

2. The plaintiff's life expectancy is not 16 years as used in the Court's calculation but rather 20 years as the Court recognized in its opinion. Three dollars per day for 20 years comes to \$21,900, or \$17,520 discounted. On the basis of the computation of the incorrect number of years, there is an error of \$3,660. If, however, the erosion of the dollar is considered, then the award for 20 years should actually be \$21,900,\* making a difference of \$8000 from the amount which the Court awarded.

#### CONCLUSION

Upon all the evidence in the interests of justice, the Court should reconsider the calculations contained in its opinion of August 6, 1974 and allow the verdict of \$90,000, as supported by the evidence, to stand.

Respectfully submitted,  
PAUL C. MATTHEWS  
Attorney for Plaintiff  
Office and P.O. Address  
11 Broadway  
New York, N. Y. 10004

\*Discounted

A-117  
COURT OF APPEALS  
UNITED STATES [REDACTED] FOR THE SECOND CIRCUIT  
CHAMBERS OF  
JUDGE MURRAY I. GURFEIN  
UNITED STATES COURT HOUSE  
FOLEY SQUARE  
NEW YORK, N. Y. 10007

October 11, 1974

Paul C. Matthews, Esq.  
11 Broadway  
New York, N.Y. 10004

Re: Donovan v. Penn Shipping  
70 Civ. 3572 MIG

Dear Mr. Matthews:

Judge Gurfein has asked me to investigate whether it would be appropriate for him to certify his order of remittitur in the above case. As you know, the entry of such an order is a matter left to the sound discretion of the trial judge.

6A Moore ¶ 59.05[3], 59.08[6]. Discretionary orders are not considered appropriate for certification under 28 U.S.C. § 1292(b). 9 Moore ¶ 110.22[2] at 261. As a result, the Judge will be unable to grant your request for certification.

As to how you should proceed to secure review, you might find the following helpful:  
6A Moore ¶ 59.05[3] at notes 42a-42i; 9 Moore ¶ 203.06 at notes 30-32.

Sincerely,

*Linda D. Simonson*

Linda D. Simonson  
Law Clerk to Judge Gurfein

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

RECEIVED IN CHAMBERS  
OF JUDGE HENRY F. WERKER

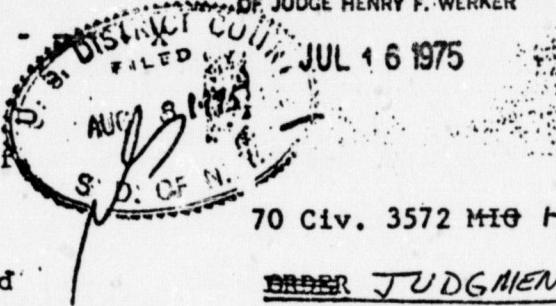
FRANCIS X. DONOVAN,

Plaintiff

- against -

PENN SHIPPING CO., INC., and  
PENN TRANS. CO., INC.,

Defendants.



70 Civ. 3572 MFB HFW

ORDER JUDGMENT

# 75,666

X

The above case having come on for trial before the  
HONORABLE MURRAY I. GURFEIN, U. S. District Judge, and a jury on  
February 20, 21 and 22, 1974, and the jury having rendered its  
verdict in favor of the plaintiff and against the defendant in the  
sum of \$90,000, and defendant having moved for a new trial and the  
Court having rendered its decision on August 6, 1974 granting a  
new trial unless the plaintiff consent to a remittitur of \$25,000,  
and the plaintiff having moved on August 16, 1974 for re-argument  
and said motion having been denied on September 26, 1974, and the  
plaintiff having waived his right to a new trial and accepted the  
remittitur under protest without prejudice to his right to appeal  
therefrom, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiff have judgment  
against the defendants in the sum of \$65,000 together with interest  
thereon from the 22nd day of February, 1974.

Dated: New York, N. Y.  
July 16, 1975.

August 4, 1975

*J. Henry F. Werker*  
U. S. D. J. N.Y.

JUDGMENT ENTERED - 8/6/75  
Katherine F. Beary Lord  
Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

X  
FRANCIS X. DONOVAN,

Plaintiff,  
against  
PENN SHIPPING CO., INC., and  
PENN TRANSPORTATION CO., INC.

Defendants.

NOTICE OF MOTION FOR  
AMENDMENT OF JUDGMENT  
PURSUANT TO RULE 59(e)  
F.R.C.P.

Index #70 Civil 3572

S I P S:

PLEASE TAKE NOTICE, that upon the annexed affidavit  
of THOMAS H. HEALEY sworn to the 13th day of August, 1975 upon  
the Judgment entered August 8th, 1975, and upon the other  
documents annexed hereto, and upon all the proceedings and  
stipulations heretofore had herein, the undersigned will move  
pursuant to Rule 59(e) of the Federal Rules of Civil Procedure  
before the Honorable Henry F. Walker, United States District  
Judge, United States Courthouse, Southern District of New York,  
Foley Square, City and State of New York on the 25th day of  
August, 1975 at 10:00 in the forenoon of that day or as soon  
thereafter as counsel can be heard for an order Amending said  
judgment or for such other and further relief as this Court  
may deem just and proper.

Attest: New York, New York  
August 13th, 1975

Yours, etc.,  
DARBY, HEALEY & STONEBRIDGE  
Attorneys for the Defendants

By:

A Member of the Firm  
19 Rector Street  
New York, New York 10006

TO: PAUL C. MATTHEWS, ESQ.  
Attorney for Plaintiff  
11 Broadway  
New York, New York 10004

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

FRANCIS X. DONOVAN,	:	
Plaintiff,	:	
- against -	:	<u>MEMORANDUM DECISION</u>
PENN SHIPPING CO., INC., and PENN	:	70 Civ. 3572 (HFW)
TRANS CO., INC.,	:	
Defendants.	:	
-----x		

HENRY F. WERKER, D. J.

A motion has been made by the defendants pursuant to Rule 59(e) of the Federal Rules of Civil Procedure for an order amending the judgment in this case entered on August 6, 1975. The defendants ask this court to make two changes: first, to disallow the plaintiff's acceptance of the remittitur under protest and second, to strike the award of pre-judgment interest and award interest only from the date of judgment.

The question of the propriety of accepting a remittitur under protest has recently been presented to but not decided by the Second Circuit. See Reinertsen v. George W. Rogers Construction Corp., Civil No. 72-2155 (2d Cir., filed July 3, 1975). However, it is this court's view that this form of a judgment should be permitted. If the Court of Appeals believes the order of remittitur to be in error, it can set aside the judgment and order that judgment on the jury verdict be entered; on the other hand, if the Court of Appeals believes the order to be proper, it can affirm the order and the judgment will be final. Either way, a new trial is not necessary.

The judgment granted the plaintiff interest from the date of the jury

NOV 26 1975

# 434 44  
JG  
S.U.O. 9 NOV 26 1975  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

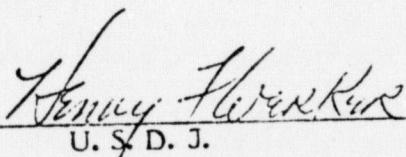
verdict, February 22, 1974. However, no judgment was actually entered until August 6, 1975. Section 1961 of 28 U.S.C. states that interest shall be calculated from the date of the entry of the judgment. In similar circumstances, the Second Circuit held that judgment could not be entered until a motion to set aside the verdict had been decided and that after the motion was granted, with leave to file a remittitur, interest was to be calculated from the date the judgment was noted in the civil docket book. Murphy v. Lehigh Valley R.R., 158 F.2d 481 (2d Cir. 1947).

The defendants' motion is granted in so far as it seeks to strike the prejudgment interest award and to set August 6, 1975 as the date from which the interest due shall be calculated. In all other respects, the motion is denied.

SO ORDERED.

DATED: New York, New York

November 21, 1975

  
\_\_\_\_\_  
U. S. D. J.

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MATTHEWS 1610 Donovan v. Penn Shipping

STATE OF NEW YORK )  
: SS.  
COUNTY OF NEW YORK )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of Jan. 1976 deponent served the within Appendix upon:

Darby, Healey & Stonebridge, Esqs.

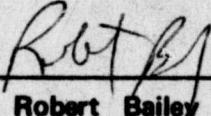
attorney(s) for

Appellee

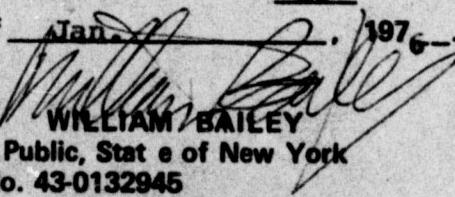
in this action, at

19 Rector St., New York, N.Y. 10006

1 true copy  
the address(es) designated by said attorney(s) for that purpose by depositing ~~3~~ ~~one~~ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

  
\_\_\_\_\_  
Robert Bailey

Sworn to before me, this 19  
day of Jan. 1976.

  
WILLIAM BAILEY  
Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1976